



RPD File No. / N° de dossier de SPR : VA6-03547

Private Proceeding / Huis clos

Reasons and Decision – Motifs et décision

Claimant(s) XXXXX XXXXX **Demandeur(e)s d'asile**

Date(s) of Hearing 22 October 2007
13 November 2007 **Date(s) de l'audience**

Place of Hearing Vancouver, BC **Lieu de l'audience**

Date of Decision March 27 2008 **Date de la décision**

Panel Philip MacAulay **Tribunal**

Counsel for the Claimant(s) Douglas Cannon **Conseil(s) du / de la / des demandeur(e)s d'asile**

Tribunal Officer Linda Steinson **Agent(e) des tribunaux**

Designated Representative(s) Nil **Représentant(e)s Désigné(e)s**

Counsel for the Minister Documents Only **Conseil du ministre**

Reasons and Decision

[1] The claimant alleges that he is a citizen of China. He claims to have a well-founded fear of persecution from his family and state authorities in China by reason of his membership in a particular social group i.e., a child in China. In addition, he claims to be a person in need of protection because he would be subjected personally to a danger of torture or to a risk to his life or of cruel and unusual treatment or punishment in China.

ALLEGATIONS

[2] The following is a synopsis of the claimant's story taken from his Personal Information Form (PIF),¹ as supplemented by the claimant's testimony and the evidence at the hearing.

[3] The claimant was 18 years old at the date of his refugee protection hearing having been born in Changle City, Fujian Province, China. He is a citizen of that country.

[4] The claimant was 17 years old at the time he left China for Canada (i.e., XXXXX 2006). By that time, he had had 9 years of formal education, having received his junior high school diploma.

[5] Upon his arrival in Canada, the claimant was taken into the care of the B.C. Provincial Ministry of Children and Families. He has since been attending school, working and living with a foster family.

[6] The claimant's father and mother, together with his two siblings continue to live in China. As at the time he signed his PIF, the claimant's brother was 23 and his sister was 21 years old.

¹ Exhibit 1.

PIF narrative and Testimony

[7] In his PIF, the claimant makes the statement that he left China to get away from years of problems he had had with his parents and at school, stating that in China he had no freedom.

[8] He describes a strict upbringing which included his being “beaten” by his parents for poor grades and being hit by his teachers on the back of the hand with a wood or metal stick for having bad marks.

[9] He related one occasion when he was in elementary school, of his running away because his mother beat him before school. He did not know why she did that but, by the end of the day, he was home and things were better until his next report card. He said that he did not work while he still lived with his parents. He says that he was always unfavourably compared to his older brother.

[10] He complained that he was hit often. He stated that this was usually done by his mother “but hardly ever by his father”. Usually, she would slap him or hit him with a 70-80cm bamboo stick she would pick up at random. This would usually be because he did not get good grades or had come home late. He was never injured such that he needed to go to the hospital or see a doctor. He compared his new life in Canada (which, he said made him happy as, “after work, I can do what I want to”, like meet with friends for a meal or play on the computer) with that in China where he said there was nothing to do. In China, he would sometimes go out to play basketball but his mother always controlled his friends having “thought that some of them were bad”. She would not let him have a girlfriend.

[11] He complained that children who were better off were treated more favourably by teachers as those children could give nice things to the teachers. He also relates one event in middle school where he was slapped in the face by a teacher for playing basketball as exams approached. He also had to stand still outside of the teacher’s class for 2 hours after school for three days. He says that a gym teacher hit the children quite often. Upon questioning, the claimant said that the Physical Education (P.E.) teacher would occasionally “kick the rear ends” of the students who were running too slow, but he “did not kick him [the claimant] very much”.

Other students told the claimant that they had complained to the education authorities but nothing came of these complaints.

[12] After he failed his entrance exam for high school, the claimant's family sent him to live with and work for an uncle who ran a supermarket some distance away who had him work very long hours. The claimant said he had no choice in doing this. The uncle did not beat him but did scold him from time to time. The money he earned was sent back to his parents. After about a year, and because he "still had no freedom", the claimant quit working for the uncle.

[13] The claimant felt that he had no good future in China and asked his family to help send him out of the country and they agreed. The claimant described how many people in his village had done so and "following that, my family members wanted me to get out". They wanted him to "earn money". He testified that he, personally, wanted to get out too. The parents found a "snakehead" and paid \$ 70,000(US) to get the claimant to Canada. The claimant states that the snakehead told him about making a refugee claim, but that he told him, "to not tell the truth to immigration otherwise I would be deported". Therefore, when he arrived in Canada the claimant "made up some story under the fear."

[14] The claimant testified that he could not stand to go back to China. He says he is afraid to do so as, "I was tortured since I was young that made me so hurt in my heart." He stated that the schools are very poor, he had no confidence in the government and that the government was corrupt. The claimant had been speaking with his parents with frequency since he arrived but now speaks with them far less. He has cut back because all they want to talk about is how he can earn more money to send back to them. They encouraged him to move on to Toronto where there are better jobs and where he could live with some relatives and not have to spend money on room and board, thus being able to send them more. The claimant says that, after he pays off the debt they incurred to send him to Canada, he will not send them any more money.

[15] Since arriving in Canada and taking up residence with his foster family, the claimant went to school for a period of time, but eventually quit to take on full-time employment at an auto-dealership, washing and detailing cars. He works long hours. At one point he was working 60-70 hours and 6-7 days per week. He now works 8 hours at least 5 days per week and earns approximately \$1,900 per month, of which he sends almost all back to his parents.

[16] The claimant has received psychological treatment since his arrival. A clinical psychologist concluded that the claimant suffers symptoms “congruent with a DSM-IV diagnosis” of chronic posttraumatic stress disorder which, based on information the doctor received from the claimant, she concluded developed from a long history of parental abuse, coupled with physical punishment at school.”² The doctor found the claimant to have depressive symptoms and to have a sensitive temperament, being introverted and “very deeply impacted by other’s behaviours, be they negative or positive.” She notes that there are positive signs arising from the claimant now living in a stable environment. She noted the claimant’s self-awareness that, while he benefits from being away from his parents, he, nonetheless, labours under expectations to send money home to them. He feels empowered to be capable of making money. The doctor closes with the observation that the claimant shows a vulnerability to being irreversibly impacted psychologically should he have to return to a family and social environment in China which has been potently negative for him.

[17] XXXXX XXXXX is a social worker who works for the provincial Ministry responsible for children and who heads a immigrant services program that, inter alia, assists unaccompanied minors who arrive in Canada. She met the claimant upon his arrival when he was 17. She is responsible for having found the claimant foster care and tries to meet with him once a month. The claimant phones her as well. She says he does not contact her with specific issues but that he “likes to chat.” She noted areas of progress the claimant has made but also commented on his occasional depression. She describes this claimant as being emotionally fragile and needy. Even so, he is doing very well in that he is working (if, indeed, working too hard) but feels he is not doing well enough. Ms. XXXXX noted that, in her experience, she has dealt with very many minors who have travelled to Canada from Fujian Province. She stated that it was very typical for a Fujian family to go into debt to send a child overseas with a plan that that person’s next step is to sponsor the parents or a younger brother to follow along later.

[18] Ms. XXXXX was asked by counsel what she thought the impact would be if the claimant was returned to China. Her first comment was that it would be difficult for him because, in her opinion, “all along he’s wanted to be accepted by his parents”, “that he wants unconditional love from them”. If sent back, he would be a total disappointment to his parents in his eyes. She stated

² Exhibit 6 Tab 1.

that, in her experience, it is very hard culturally, for Fijian children to sever bonds with their parents as “they all feel in debt to their parents.”

[19] In summing up, the claimant testified that he came to Canada because his parents wanted him to. The claimant did not want to stay in China anyway “because there was no freedom there”. He says he fears for his life if he were to return, either because he would be killed by “people” for not having paid off his debt, or he would kill himself out of despair at having lost his freedom. He said that he believed that it would be “illegal” for him not to live with his parents if he returned even though he would be an adult under Chinese law. However, he also noted in his testimony that his unmarried older brother had left home to work in a factory upon finishing high school.

DETERMINATION

[20] In arriving at my determination I have considered all of the evidence submitted, the claimant’s testimony at the hearing, observations made by the refugee claimant’s testimony at the hearing, observations made by the refugee protection officer and counsel’s submissions.

[21] I find the claimant is not a Convention refugee, as he does not have a well-founded fear of persecution for a Convention ground in China. I also find the claimant is not a person in need of protection in that his removal to China would not subject him personally to a risk to his life or a risk of cruel and unusual treatment or punishment and in that there are no substantial grounds to believe that his removal to China will subject him personally to a danger of torture. My reasons follow.

IDENTITY

[22] The claimant’s identity as a national of China is established by his testimony and his Resident ID Card.³

³ Exhibit 2.1B.

ANALYSIS

[23] Counsel has ably raised a number of issues in this claim, many of which are germane only if the credibility of the claimant's story of his mistreatment by his family and at school is accepted. For example, Counsel argues that the claimant is a Convention refugee by reason of his membership in a particular social group. In his written submission of November 19, 2007,⁴ counsel defines the "group" in this case as "a person who was a minor at the time of his departure from China or, alternatively, as a child (despite his status under Federal law)." However, Counsel further submitted that "nexus does not, however, equate to persecution. Persecution can only be found on the facts that relate to such a nexus. Whether there is related persecution is a question of fact to be determined in this case." Counsel provided argument as to why the claimant should still be considered to be a "child" for nexus purposes, even though he has attained the age of 18 since his arrival in Canada. Counsel provided extensive country condition documents concerning children which he submitted buttressed the claimant's claim, based upon what Counsel submitted was evidence of the persecution of "children" in China. He also provided a compendium of international agreements concerning children's rights. I thank Counsel for these submissions.

[24] However, as is evident further in this decision, I do not find the claimant's story to be credible and trustworthy and, thus, I do not conclude that he has well-founded fears of any persecution, by his family, school or otherwise arising from any status as a "child". For similar reasons, I find that he has no valid claim pursuant to section 97 of the *Immigration and Refugee Protection Act* (the "Act" or the "IRPA").⁵

The claimant's credibility

[25] The main issue raised in this claim is that of the credibility of the claimant. I find that there is reason to doubt the claimant's truthfulness. In particular, I noted contradictions and inconsistencies in the claimant's evidence. The explanations provided by the claimant were not satisfactory in resolving these.

⁴ Marked Exhibit 11 post-hearing.

⁵ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[26] The claimant's claim requires credible and trustworthy evidence before a number of counsel's arguments may make traction. I have not found the claimant to be credible.

[27] There are obvious inconsistencies and omissions as between the information the claimant provided to the Immigration Officer and in his PIF and testimony. It is permissible for the Board to make a negative determination on credibility on the basis of such inconsistencies and omissions.⁶ I have not found the claimant's explanations for these discrepancies satisfactory.

[28] Upon his arrival in Canada on December 19, 2006, the claimant provided a written statement⁷ as to why he had come to this country. He noted the oppressive rule of the Communist Party and that the government of China was corrupt and undemocratic. He stated that that was why he had come to Canada, a country he said was "civilized, liberal and rich". He stated that he wanted to establish himself in Canada. He wrote that, what was most important of all, was for him to have political protection so that he would not need to fear or fight corruption. He did not mention any family problems.

[29] The claimant was also interviewed on December 19 by an Immigration Officer who has provided a Declaration as to the contents of that meeting.⁸ In that interview the claimant initially stated, at considerable detailed length, that he was a practitioner of Falun Gong and that he and his friends had been suppressed "so we fled from the government and fled from China.". He later said that he had stopped that practice of Falun Gong in 2002 when the government began a crack-down. He was asked if he had any problems with the government since that time and he replied, "no".

[30] Further on in the interview, the claimant said he had stopped attending school because he had failed his exams. He denied ever having been tortured by the government. He denied seeking entry into Canada because of political affiliation with any organizations and stated, "I just lost hope and faith in my country." He was asked if he sought entry for any of the 5 grounds of section 96 of the Convention which were enumerated for him and he said, "not right now."

⁶ *Zaloshnja, Ylldes v. M.C.I.* (F.C.T.D., no. IMM-755-02), Tremblay-Lamer, February 20, 2003.

⁷ Exhibit 2.2.

⁸ Exhibit 2.1B.

[31] The claimant raised no issues of any alleged mistreatment by his parents or relatives in this interview. Importantly, at the end of the interview, the claimant confessed that he had not told the truth earlier when he mentioned his membership in Falun Gong. He said the story was “untruthful and false” and that it was a story provided by the smuggler who had helped him come to Canada.

[32] The claimant went on to say:

My true intention to stay in Canada is to seek a better lifestyle. I come from a poor family, and my parents are in debt to smuggle me to Canada. If I go back now, I would disgrace the family. My mother and father are both really sick and I would like to work in Canada to be able to send them some money to pay off the debt.

[33] Finally, the claimant was asked, “so do you have any fears of your country?” to which he replied, “no, not really.” He then confirmed that he had given his complete story and that he had nothing else to add.

[34] In his initial interview, the claimant makes no mention whatever of any problems with his family. He does tell an untrue story about involvement with Falun Gong. He abandons that story at the end of the interview saying that it was something that he was put up to by the “snakehead”.

[35] However, having confessed to lying to the Officer, he does not then go on to tell him that his “real” claim is based on his mistreatment by his family or school. That, to my mind, may be seen to have been the opportune time to come forward with the “truth”. Instead, the claimant frankly stated that he had no fears of his country and that “my true intention to stay in Canada to seek a better lifestyle.” He said that he came from a poor family and that his parents went into debt to smuggle him into Canada. He wanted to work in Canada to earn money to send back to them to pay off that debt.⁹

[36] I found these statements to the Officer to be plausible and credible in the circumstances. It is not plausible to me that one would garner the courage to confess to a lie to a uniformed authority, only to immediately resume not telling the truth. I find, on a balance of probability, the second reasons for his departure from China that he gave to the Officer to be credible and to

⁹ Exhibit 2.1B.

provide a rationale for the claimant's travel to Canada. He sought a change from China for personal and economic reasons, and with support from his family. The allegations concerning his family and school's alleged mistreatment of him I do not find to be credible and, ultimately, not trustworthy in establishing persecution or s. 97 risks.

[37] Even if the claimant's stories about his mistreatment by his parents, uncle and school were accepted as credible (which they are not), the conduct he describes does not, in my view, amount to persecution, torture, cruel and unusual treatment or punishment or a risk to life.

[38] The "beatings" the claimant described appeared more in the nature of low-level corporal punishment, as opposed to anything approaching "persecution", "torture" or "cruel and unusual treatment or punishment". There is no evidentiary basis presented in this claim for the proposition that the claimant's life was, or would be in danger if he were to return to China.

[39] To be "persecutory", the conduct must constitute a serious denial of a core human right.¹⁰ "Cruel and unusual treatment or punishment" requires that the punishment be grossly disproportionate to that which would be appropriate to punish, rehabilitate or deter the offender and not be, in and of itself, unacceptable, no matter what the crime, no matter what the offender. Although any form of punishment may be a blow to human dignity, when a punishment becomes so demeaning that all human dignity is lost, then the punishment must be considered cruel and unusual.¹¹ There is no basis in this claim that there would be any severe pain or suffering inflicted on the claimant by or at the instigation of, or consent or acquiescence of a public official or other person acting in an official capacity as "torture has been defined by the authorities.

[40] Assuming the allegation of mistreatment to be true, what we have is that the claimant was occasionally slapped and struck with a thin stick by his mother. There was no occasion when the claimant required any medical treatment. Those events were associated with the claimant not achieving satisfactory grades or his coming home late. The claimant's school experience was also not progressive but did not, on a balance of probabilities, attain the level of seriousness or persistence necessary to attain the level of "persecution". (In any event, the claimant has testified that he had finished his schooling in China, so that alleged potential agent of harm would no

¹⁰ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.

¹¹ *Kindler v. Canada* [1991] 2 S.C.R. 779.

longer be present.) His was not a particularly “nurturing” up-bringing but it was not persecutory in my view. Such force applied to children has been determined by the Supreme Court of Canada¹² to not offend principles of fundamental justice, provided the force is intended to be for corrective or educational purposes, relating to restraining, controlling or expressing disapproval of a child capable of benefiting from the correction. That case also found that a statutory protection for parents or teachers applying such discipline did not offend the Charter of Rights and Freedoms. The Court found that it was not a principle of fundamental justice that laws affecting children must be in their best interests. The allegations made by this claimant concerned conduct that was disciplinary in nature and was not inhumane, degrading, cruel or unusual. He was not “tortured” nor was his life at risk.

[41] The claimant was sent to work for an uncle when he failed to attain grades sufficient to go on in school. In a country as poor as China, such a step might be seen as necessary if one is not going to school. Evidence that children in China may be expected to provide support for other family members through filial piety or economic necessity is not conclusive, on a balance of probabilities, that the expectation is persecutory in and of itself. Such a finding of persecution would require evidence, if trustworthy, of conduct that attains a persecutory level I have found did not exist in this case. In any event, it is to be remembered that, after a year, this claimant was able to quit the job with his uncle and then obtain his parents support to travel to Canada.

[42] The claimant’s reaction to his up-bringing has not been good in the view of the professional who has met with the claimant since he arrived in Canada. Of course, the psychologist was reliant upon the claimant’s description of what had occurred to him in making her diagnosis. Her opinion that the claimant suffers from a level of post-traumatic stress disorder is “congruent” with the experience he described, but this does not form an independent determinative conclusion of the credibility or trustworthiness of the claimant’s story or that the conduct itself was persecutory. Those determinations are left to this Board.

[43] As Justice Beaudry noted in *Kabedi v. Canada (MCI)*:¹³

¹² *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4.

¹³ *Kabedi, Tshibunda Leah v. M.C.I.* (F.C., no. IMM-4150-04), Beaudry, February 7, 2005, 2005 FC

19. Case law in similar matters has established that it is the responsibility of the panel to judge upon the value to be given to expert testimony.

In *R. v. Abbey* (1983), 138 D.L.R. (3d) 202 (S.C.C.), at paragraphs 41 and 48, the Supreme Court of Canada stated as follows:

An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second-hand evidence. This is especially true of the opinions of psychiatrists. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. (Emphasis added.)

20 In *Danailov v. Canada (Minister of Citizenship and Immigration)*, [1993] F.C.J. No. 1019 (F.C.T.D.) (QL), at para. 2, Reed J. explained that:

With respect to the assessment of the doctor's evidence, to find that that opinion evidence is only as valid as the truth of the facts on which it is based, is always a valid way of evaluating opinion evidence. If the panel does not believe the underlying facts it is entirely open to it to assess the opinion evidence as it did. (Emphasis added.)

21 The applicants in this case were found to lack credibility. The panel therefore was open to set aside the medical documents, since in its view they did not establish a link with the persecution alleged.

[44] In this case, the expert report¹⁴ relies upon facts related to the doctor by the claimant and not upon any first-hand knowledge of the doctor. The doctor determined that the psychological state she observed in the claimant was “congruent” (or, consistent) with her opinion of some abuse but that finding does not, of itself, establish that the alleged abuse occurred.

[45] There is little doubt but that the claimant would prefer to stay in Canada. However, that desire is not relevant in my determination as to whether the claimant ever suffered persecution while in China, or if he would do so upon his return. Like many Fujian children, this claimant feels a great debt to his parents and wishes to provide them with money. As well, also like many similar children, he was “sponsored” to travel to Canada to earn this money and, hopefully, if he successfully establishes himself here, bring the rest of his family here as well.

¹⁴ Exhibit 6 tab 1.

[46] I have found the claimant not to be credible in establishing the trustworthiness of what he alleges happened to him at the hands of his family or school authorities. As Counsel stated in his submission¹⁵ (after alleging a particular social group as being that of a minor child in China,) “nexus does not, however, equate to persecution. Persecution can only be found on the facts that relate to such a nexus. Whether there is related persecution is a question of fact to be determined in this case.” Even if a “child” in China is a proper nexus and if this, now 18 year old, met the definition of “child” for the purposes of this refugee protection claim (and I make no such findings), given my foregoing factual conclusions, this claimant has established no personal basis upon which he can be identified with the persecution that may have been suffered by other particular members of that group. Country conditions alone do not justify the granting of refugee status. The claim must be personalized.¹⁶

“Compelling Reasons”?

[47] The claimant firstly claimed that he has a well-founded fear that he would face persecution (or section 97 risks or danger) if he returned to China. Alternatively, his counsel submitted that there are compelling reasons which, pursuant to section 108 (4), dictate that the claimant should not be returned to China due to his previous persecution, torture, treatment or punishment.

[48] Given my above-noted determinations, the compelling reasons argument raised by counsel will not be considered further. This is so as the law is clear that, before section 108(4) of the *IRPA*¹⁷ comes into play, there must be a finding that, at one time, there was persecution or a

¹⁵ Exhibit 11.

¹⁶ *M.P.S.E.P. v. Gunasingam* 2008 FC 181; *M.C.I. v. Fouodji, Marie Thérèse* (F.C., no. IMM-1673-05), Pinard, September 30, 2005, 2005 FC 1327; *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 501 (C.A.)

¹⁷ *IRPA, Section 108.*

(1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

(e) the reasons for which the person sought refugee protection have ceased to exist

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

section 97 risk or danger in the country of origin and that it existed at the time the claimant left that country. Inasmuch as I have not made a finding of such pre-travel persecution, danger or risk, it therefore follows that the “compelling reasons” claim must fail.

CONCLUSION

[49] I did not find the claimant to be a credible witness. As a result, I am of the opinion that there is not more than a mere possibility that should the claimant be returned to China he would face persecution or on the balance of probabilities be at risk of torture or risk to life or at risk of being subjected to cruel and unusual treatment or punishment.

[50] For these reasons I determine that XXXXX XXXXX is neither a Convention refugee nor a person in need of protection and I therefore reject his claim.

(signed) “Philip MacAulay”

Philip MacAulay

27 March 2008

Date (day/month/year)

KEYWORDS - REFUGEE PROTECTION DIVISON - REFUGEES - PARTICULAR SOCIAL GROUP - CHILDREN - PERSONS IN NEED OF PROTECTION - CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT - TORTURE - CREDIBILITY - MALE - NEGATIVE - CHINA