

Federal Court



Cour fédérale

Date: 20090609

Docket: IMM-5037-08

Citation: 2009 FC 605

Ottawa, Ontario, June 9, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

DE HUA QIU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated October 21, 2008, where the Board determined that the Applicant was not a Convention refugee or a person in need of protection.

Issues

[2] This application gives rise to the following issues:

1. Did the Board err in finding that the Applicant is not a genuine practising Christian?
2. Did the Board err in finding that the Applicant would be able to practice Christianity in China, therefore finding that the Applicant is not at risk of persecution in China on the basis of his religion?

[3] The application for judicial review shall be allowed for the following reasons.

Factual Background

[4] The Applicant is an eight year old citizen of the People's Republic of China. He came to Canada on June 19, 2007 with his mother to seek refugee protection. The Applicant relies on his mother's Personal Information Form (PIF) narrative.

[5] The Applicant's father deserted his mother and her children in July 2006. Soon after, she became stressed and depressed and in December 2006, a friend spread the gospel to her. She was told her friend's church was illegal but she decided to attend a service in January 2007 to see if it would help her. She continued to attend regularly until May 6, 2007, when the Public Security Bureau (PSB) raided the church meeting. She escaped and went into hiding. She later learned that the PSB was looking for her and she then decided to leave China.

[6] In an amendment to the PIF, the Applicant indicates that he has been attending church in Canada and he fears repercussions for having done so if he returns to China. He also fears that he would not be able to practice Christianity in China.

Impugned Decision

[7] The Board found that the Applicant was neither a Convention refugee nor a person in need of protection. According to the Board, the Applicant's identity was in doubt because of the status of his mother's PIF and documentation. The Minister filed evidence indicating that the Applicant's mother made two separate refugee claims using different names. In addition, there was evidence that the woman, now calling herself Zha Ding Lin and mother of the Applicant, entered Canada on November 14, 1998 using a different name than the two already noted by the Board. The Minister mentioned that it had not been possible to verify the identity of either the Applicant or his alleged mother. The Minister also indicated that the Applicant's mother's PIF is null and void because her claim has been terminated by Canadian immigration officials.

[8] During the hearing, the Applicant was asked several questions by his counsel and by the Board regarding his identity. He was able to describe his family circumstances in China and he indicated that his grandmother lived with him and his mother in China and that his sister lived with their aunt because her school was too far from their family home. The Applicant knew his birthday and had a distant memory of his father. He was able to describe the arrival of the Public Security Bureau at their home and being reunited with his mother a few days before they left China. He told the Board that he would miss his grandmother and friends but he looked forward to travelling.

According to the Board, the Applicant testified in a straightforward manner and was unusually poised and confident for an eight year old child.

[9] The Board stated that the Applicant's birth certificate disclosed as evidence of identity was likely fraudulent. The Applicant also disclosed copies of a Children's Preventative Inoculation Certificate, a Student Achievement Booklet and his mother's *hukou*, all allegedly issued in China. It was difficult for the Board to make a finding regarding the Applicant's identity because of the fraudulent nature of the birth certificate and the fact that only copies of the school document and immunization report were disclosed. However, the Applicant is registered in his mother's *hukou* and there is no evidence that he was born in Canada. The Applicant's Mandarin oral testimony was also straightforward, un-delayed and without any inconsistency. Although having doubts regarding the Applicant's identity, the Board found that, on a balance of probabilities, he was a citizen of China.

[10] The Applicant stated that he feared persecution because of his mother's situation in China and because he attended a church in Canada and he feared that he would not be able to practice Christianity in China. The Applicant testified that he did not attend church in China and his first experience with church attendance took place after he arrived in Canada with his mother. A letter from the Applicant's pastor confirms that he began attending the Toronto Chinese Evangelical Church on July 1, 2007. The Applicant testified that he attended a children's group where he learned to pray and heard stories, while his mother attended the regular church service. He was asked his religion and responded: "Not quite sure". At the end of the examination, his Designated Representative indicated that she had asked him the same question during a break in the hearing and

she noted that the Applicant was confused with the question. However, the Board found that, given his young age, confusion regarding his religion is neither surprising nor unreasonable.

[11] The Applicant was able to answer questions regarding Christianity and said Jesus was the son of God and that his parents were Mary and Joseph. He was able to tell a story about Jesus, to sing 'Jesus loves me' and to recite a personal prayer. He was brought to a weekly Sunday school class by his mother and he has acquired some rudimentary information about Christianity. The Board noted that his knowledge of Christianity reflects both his minimal experience and his young age. The pastor of his church indicated in his letter that the Applicant could not be baptized because he was too young to be asked questions regarding his commitment to Christianity that must be asked and answered before baptism is possible. The Board found that, on a balance of probabilities, the Applicant was not a genuine practicing Christian.

[12] The Minister indicated that even if the Applicant were able to rely on his mother's PIF narrative, there is no information pertaining to the persecution of the Applicant on religious grounds and the Board agreed with this assertion. There is no evidence that the PSB is pursuing him.

[13] Country documentation concerning children of underground church members indicates that there may be consequences, such as the denial of access to schooling. However, the Applicant indicated that his sister was in school in China. The documentary evidence cited mentions that such consequences may exist in some areas of the country, but Fujian Province, the Applicant's home province, has been described as one of the most liberal in China regarding Christianity. There is

evidence of some arrests of children who attended a service in Sichuan and Xinjiang Provinces and their release after interrogation but there is no evidence in this regard for Fujian Province. In addition, crackdowns have not been cited in Fujian Province.

[14] The Board found that, after considering the country documentation as well as the fact that the Applicant had never attended church in China, he is not at risk of persecution on religious grounds. Regarding his alleged fear of repercussions in China because he attended a church in Canada, the Board found no evidence that the mere attendance of a church in Canada would be a basis for PBS interest in the Applicant.

[15] With regard to the Applicant's fear that he will not be able to continue to practice Christianity in China, the Board found that the Applicant would not be constrained in attending a registered Christian church in China as tens of millions of other Chinese citizens do. The Applicant's pastor noted in his letter that he was too young to be baptized and therefore to become a full member of the church and a born again Christian. Similarly, the Board found that the Applicant would be too young to become a recognized member of a registered church in China but there is no evidence that he could not attend a church and practice Christianity in China. It was argued that there has been government interference with doctrinal decisions in registered churches but this assertion is not supported by any concrete evidence. While there are doctrinal debates in China, these exchanges are not unknown in churches throughout the world, including Canada. The Board found, on a balance of probabilities, that there is no evidentiary basis that the Applicant could not practice Christianity in a registered church in China. The Board noted that while it is regrettable that

an eight year old boy has been placed in this situation, it was necessary to make a finding regarding his claim.

Standard of Review

[16] The determination of whether the Applicant is genuine practising Christian is a question of fact reviewable pursuant to the standard of reasonableness and deference applies (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53).

[17] The standard of review applicable to decisions of the Board for matters within its expertise was patent unreasonableness (*Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741 at para. 25). The determination of whether the Applicant would be able to practice Christianity in China and whether he is at risk of persecution in China on the basis of his religion lies within the expertise of the Board. Following *Dunsmuir*, the appropriate standard of review is that of reasonableness (*Dunsmuir*, above at para. 47).

1. *Did the Board err in finding that the Applicant is not a genuine practising Christian?*

[18] The Applicant submits that the Board's analysis was incoherent and internally inconsistent, and that its conclusion was both illogical and unreasonable. The Board's decision indicates that when the Applicant was originally asked his religion during his hearing before the Board, he stated that he was "not quite sure". In its decision, the Board rejected the Applicant's confusion in respect of this question, while at the same time explicitly accepting that, given his young age, his confusion regarding his religion and denomination were "neither surprising nor unreasonable". The Applicant

submits that the Board's analysis in this regard was inconsistent and that its conclusion did not follow logically from its preceding analysis. The Board gave no indication as to why it rejected the Applicant's indication of confusion when, according to its own reasoning, such confusion was both predictable and reasonable.

[19] This lack of coherence continued when the Board evaluated the Applicant's testimony regarding his knowledge of Christianity. The Board said that the Applicant's knowledge of Christianity "reflects both his minimal experience and his young age" but it is unclear why, after demonstrating his knowledge of Christianity by correctly answering questions about this religion, singing 'Jesus loves me' and reciting a personal prayer, the Board concluded that the Applicant was not a genuine Christian. The Board gave no indication as to what the Applicant did or failed to do to convince the Board on this issue. To the contrary, the Board's decision indicates that the Applicant answered the questions put to him correctly, without hesitation and in a straightforward manner.

[20] The Board recognized that confusion at a young age is neither surprising nor unreasonable and the Respondent submits that it was not an error to reject the Applicant's alleged confusion. Throughout the hearing, the Applicant's responses were straightforward and made without delay but it was not unreasonable to draw negative inference from the fact that the Applicant was able to testify without any problems, yet when questioned by his Designated Representative during a break, in the absence of the Board member, the Applicant stated he was confused.

[21] According to the Respondent, the position of the Applicant amounts to a disagreement with the manner in which the Board weighed the evidence and assessed credibility. As such, it does not afford a legal basis for this Court to intervene. The Applicant has failed to demonstrate that the Board refused to consider any evidence, or that it ignored evidence, or that it made an erroneous finding with respect to any evidence (*Brar v. Canada (Minister of Employment and Immigration)*, [1986] F.C.J. No. 346 (C.A.) (QL); *Ye v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1233 (C.A.) (QL); *Bains v. Canada (Minister of Employment and Immigration)*, [1999] F.C.J. No. 317; *Piber v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 769, 107 A.C.W.S. (3d) 114; *Hassan v. Canada (Minister of Employment and Immigration)*, (1992), 147 N.R. 317, 36 A.C.W.S. (3d) 635 (F.C.A.)).

[22] I find that the Board contradicted itself in its reasons and erred in determining that the Applicant was not a genuine practising Christian (*Chen v. Canada (Minister of Citizenship and Immigration)* (1997), 69 A.C.W.S. (3d) 147, [1997] F.C.J. No. 118 (QL)). The Board accommodated the Applicant's particular circumstances as he is an eight year old child and even commented on the Applicant's poise and calm during the hearing. However, the Board decided that the Applicant was not a genuine practising Christian.

[23] This conclusion is contrary to the totality of the evidence and the Applicant's oral testimony at the hearing. The Applicant clearly explained that he attends the children's group at the church and he showed that he has basic knowledge of the Christian faith. The Board rightly recognized that his

knowledge reflects his minimal experience at his young age but then wrongly concluded that he is not a genuine practising Christian.

2. *Did the Board err in finding that the Applicant would be able to practice Christianity in China, therefore finding that the Applicant is not at risk of persecution in China on the basis of his religion?*

[24] In *Li v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1238, 213 F.T.R. 8, the Court noted the importance of accounting for the Applicant's age when determining the merits of her claim. In the case at bar, the Board did consider the Applicant's young age and accommodated this particularity during the hearing. However, I find that the Board did not sufficiently consider the Applicant's knowledge and experience in the testimony he provided. According to the Guidelines issued by the Chairperson pursuant to subsection 65(3) of the Immigration Act, September 30, 1996 (Child Guidelines), "In general, children are not able to present evidence with the same degree of precision as adults with respect to context, timing, importance and details." Furthermore, when assessing the evidence presented in support of the refugee claim of a child, the Board should be aware that "a child claimant may not be able to express a subjective fear of persecution in the same manner as an adult claimant.

[25] The fact that the Applicant never attended church in China is irrelevant to his claim. In *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 at para. 17, the Court stated that when seeking refugee status:

1. the applicant does not show that he had himself been persecuted in the past or would himself be persecuted in the future;

2. the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;

...

4. the fear felt is that of a reasonable possibility that the applicant will be persecuted if he returns to his country of origin (see *Seifu v. Immigration Appeal Board*, A-277-82, Pratte J.A., judgment dated 12/1/83, F.C.A., not reported, cited in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), at page 683; *Darwich v. Minister of Manpower and Immigration*, [1979] 1 F.C. 365 (C.A.); *Rajudeen v. Minister of Employment and Immigration* (1984), 55 N.R. 129 (C.A.), at pages 133 and 134).

[26] The Board did not sufficiently consider the Applicant's claim that he feared persecution because of his mother's situation in China, because he attended a church in Canada and because he feared he would not be able to practice Christianity in China.

[27] The Board indicated in its decision "... It has been argued that there has been government interference in regard to doctrinal decisions in registered churches; however, this assertion is not supported by any solid evidence. There are clearly doctrinal debates in China but such exchanges, even in regard to basic aspects of Christian beliefs, are not unknown in churches throughout the world, including Canada." (page 4 of the decision). There was documentary contradictory evidence to that effect (tribunal's record pages 276, 291, 306 and page 46 of the applicant's record). This documentary evidence was either ignored or not considered by the Board.

[28] No questions of general importance were proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be granted. The decision is set aside and remitted for redetermination by a differently constituted panel. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-5037-08

STYLE OF CAUSE: **DE HUA QIU**
and
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

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