

Date: 20060725

Docket: IMM-3387-05

Citation: 2006 FC 910

Ottawa, Ontario, July 25, 2006

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

XIAN JIANG CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Xian Jiang Chen says he left China because authorities there wanted to sterilize him against his wishes. He sought refugee protection in Canada, but a panel of the Immigration and Refugee Board dismissed his claim. Because of a number of omissions and discrepancies in his evidence, the Board disbelieved Mr. Chen.

[2] For two reasons, Mr. Chen argues that the Board should not have considered certain statements he made soon after he arrived in Canada. First, the Board should have excluded statements he made while in detention and without access to counsel. Second, the Board should not have compared his later written narrative with the statement he made at the port of entry. He maintains that the purpose of conducting an interview at the port of entry is merely to determine a person's eligibility to enter Canada, not to determine the merits of his or her refugee claim.

[3] Mr. Chen asks me to overturn the Board's decision and order a new hearing. I agree with Mr. Chen's first argument and must, therefore, grant this application for judicial review. It is unnecessary for me to consider the second argument.

I. Issues

1. Was Mr. Chen in detention and, therefore, entitled to obtain and instruct counsel without delay according to s. 10(b) of the *Canadian Charter of Rights and Freedoms*?

2. If so, should the Board have excluded the statement he made while in detention pursuant to s. 24(2) of the Charter?

II. Analysis

A. *Was Mr. Chen in detention and, therefore, entitled to obtain and instruct counsel without delay according to s. 10(b) of the Canadian Charter of Rights and Freedoms?*

(a) Factual background

[4] Mr. Chen arrived in Canada on February 23, 2004 and was taken into custody. An immigration officer interviewed him later that day. The officer interviewed him again, at greater length, on February 25, 2004. He was not given an opportunity to consult counsel.

[5] In his first interview, Mr. Chen said that he came to Canada merely for a brief holiday. He claimed to be from Taiwan. At his second interview, he said he was from Fujian province in China. He maintained that he was seeking refugee protection in Canada because he could not pay a fine imposed on him for having violated the "one-child" law in China.

[6] In its reasons for decision, the Board compared these statements with the content of his written narrative, which was prepared in March 2004, as well as his oral testimony. The Board found Mr. Chen not to be credible.

(b) Section 10(b) rights in the immigration context

[7] Section 10(b) of the *Canadian Charter of Rights and Freedoms* provides:

Everyone has the right on arrest or detention

...

(b) to retain and instruct counsel without delay and to be informed of that right;

[8] "Detention" has been defined as "a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee": *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 641.

[9] However, in most cases, a person who is seeking entry to Canada and is questioned at the border by immigration officials is not considered to be in detention for purposes of s.10(b). For example, a person who arrived in Canada without travel

documents and was then referred for a secondary examination by an immigration officer was not in detention, even though he was made to wait four hours: *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053. Justice Iacobucci held that the secondary examination formed part of the general screening process for persons entering Canada and did not amount to a detention. He distinguished this scenario from the situation where a person is suspected of importing contraband and is subjected to an invasive strip search at the border: *R. v. Simmons*, [1988] 2 S.C.R. 495.

[10] Still, a person seeking to enter Canada is entitled to the rights set out in s. 10(b) if his or her liberty is more severely constrained. In *Huang*, Justice Andrew MacKay found that a refugee claimant had been detained when she had been kept in custody under close supervision for three days, over the course of which she had been interviewed four times (*Huang v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 149, [2002] F.C.J. No. 182 (T.D.) (QL)). Similarly, in *Dragosin*, Justice MacKay found that a person who had spent two days in a correctional centre was detained for purposes of s.10(b) (*Dragosin v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 81, [2003] F.C.J. No. 110 (T.D.) (QL)). In both of these cases, he held that the detained persons should have been afforded their right to counsel.

(c) Mr. Chen's s. 10(b) rights

[11] On the facts before me, it seems clear that Mr. Chen was in detention for at least two days after he arrived in Canada. His detention commenced after his initial interview, but it is not clear how long it lasted. In any case, he had no access to a lawyer during that time and there is no evidence indicating that he was informed of his right to obtain and instruct counsel. He was under restraint in circumstances where he could reasonably have benefited from the assistance of a lawyer, but was prevented from obtaining that assistance: *Therens*, above. His second interview was clearly given while in detention. I agree with Justice MacKay that these circumstances amount to a violation of s.10(b).

B. If so, should the Board have excluded the statement he made while in detention pursuant to s. 24(2) of the Charter?

[12] In *Huang*, above, Justice MacKay concluded that the "ultimate remedy" for a violation of s.10(b) in the immigration context "would be exclusion from evidence of any statements made in that period of delay if those statements were to form a significant basis for the [Board's] decision" (para. 31). In the circumstances before him, he declined to grant that remedy because the Board had not actually relied on the statements the claimant had made while in detention.

[13] Mr. Chen argues that the Board did rely on the statement he made while in detention and asks me to order the Board to reconsider his claim for refugee protection without reference to that statement. By contrast, the respondent argues that the Board's decision would undoubtedly be the same, given that it found various grounds for doubting Mr. Chen's evidence. It suggests, therefore, that I decline to grant the remedy Mr. Chen requests.

[14] Violations of s.10(b) will usually result in an exclusion of the resulting evidence. This is because of the superordinate importance of the right to counsel in our legal system, as well as the resulting impact on the proceedings. Often, a breach of the right to counsel will affect the fairness of the ensuing proceedings. This is especially true in criminal cases where a breach of s. 10(b) may yield self-incriminating evidence in circumstances where the accused person has a right to remain silent: *R. v. Collins*, [1987] 1 S.C.R. 265. Obviously, a person seeking entry to Canada is in a different position. The right to silence is not in issue.

[15] However, I believe it is unfair for the Board to rely on a statement made by a refugee claimant that was taken while he or she was in detention and in circumstances where s. 10(b) had been violated. The person will not be aware of her legal position and, in particular, will not be aware of the legal consequences of making a statement (*i.e.* that it may be relied on to determine the claimant's credibility). Accordingly, in the circumstances of this case, I am satisfied that the fairness of the proceedings involving Mr. Chen was compromised when the Board relied on a statement obtained from him while in detention and before he had an opportunity to seek the advice of counsel to make an adverse credibility finding against him. Further, the violation of s. 10(b) was serious as it involved a very significant right under the Charter and was clearly contrary to jurisprudence in this Court. In the circumstances, I do not believe that the exclusion of Mr. Chen's statement would bring the administration of justice into disrepute. Therefore, based on the factors outlined in *Collins*, above, the Board should have excluded the statement pursuant to s. 24(2) of the *Charter*.

[16] Based on the evidence in the record and the Board's reasons, I am unable to say that the Board's decision would have been the same even if it had not considered the statement Mr. Chen gave while in detention. Accordingly, I must order a new hearing before a different panel of the Board. Since it is necessary to hold a new hearing, I need not decide whether the Board placed undue emphasis on Mr. Chen's first statement at the port of entry. It will be for the panel to weigh the evidence before it at the new hearing.

[17] Counsel requested an opportunity to make submissions on the subject of a certified question. I will consider any submissions filed within the (10) days of the issuance of these reasons.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is granted and a new hearing before a different panel is ordered;
2. The Court will consider any submissions regarding a certified question that are filed within ten (10) days of the issuance of these reasons.

"James W. O'Reilly"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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