Date: 20070920

Docket: IMM-4071-06

Citation: 2007 FC 943

Toronto, Ontario, September 20, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

XINZHI DENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Xin Zhi Deng is an adult male citizen of the People's Republic of China. He, together with another adult male citizen of that country, Zili Cui (whose application is also under consideration by this Court in proceeding IMM-6745-06) entered Canada on a valid visitor's visa. That visa expired. They sought an extension of the visa and were refused. As a result they made a claim for refugee protection in August, 2003. On August 21, 2003, the Applicants Cui and Deng were arrested and held for admissibility hearings on the basis of an allegation that they had committed crimes of serious criminality, namely major fraud, pursuant to subsection 36(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA).

[2] In November 2003, an admissibility hearing was held to determine if Deng was inadmissible for reasons of serious criminality. On May 13, 2004, the Immigration Division found that Deng was inadmissible for serious criminality. Deng's evidence was found to be unreliable and self-serving.

[3] On March 16, 2005 and June 21, 2005, a hearing was held to determine Deng's claim for refugee protection. The basis of that claim was Deng's assertion that he feared persecution in China because he was a Falun Gong practitioner and that he gave $20,000 to an illegal church which caused him to be persecuted and be at risk of persecution by Chinese authorities. That hearing was held jointly with the refugee claim hearing of Deng's colleague Cui. The Minister served notice that he intended to participate in these hearings and he did so through counsel. Exclusion by reason of Article 1F(b) of the Refugee Convention was an issue. The Immigration and Refugee Board gave its decision with respect to Deng on June 13, 2006 in which it was determined:

> 1. Deng was excluded from the application of the definition of Convention refugee and excluded from the status of a person in need of protection pursuant to Article 1F (b) of the Convention and;
>
> 2. Deng was not a Convention Refugee and not a person in need of protection and the claim does not have a credible basis.

It is this decision of June 13, 2006 that is under review.

[4] The chronology of events concerning Deng's and Cui's history including applications for refugee status is lengthy and complex. I have set out a chronological summary in an Appendix to these Reasons. I will refer to the most salient events in the course of these Reasons.

[5] Deng's counsel in his written memorandum and in oral argument argued a number of grounds as being a basis to set aside the Board's decision of June 13, 2006. They were:

1. Constitutionality of section 98 of IRPA.

   Section 98 of IRPA incorporates by reference Article 1F(b) of the Refugee Convention which excludes a person from refugee status where there are "serious reasons for considering" that he has committed "a serious non-political crime." Are these terms unconstitutional for vagueness?

2. Translation.

   Was the translation provided to Deng during the March and June 2005 hearing and the earlier January 2004 hearing adequate?

3. Adjournment.

   Was the refusal of the Board to grant Deng's Counsel an adjournment of the hearing scheduled for June 21, 2005 proper?

4. Bias.

   Was the Board Member actually or apparently biased as against Deng?

5. Fairness of Hearing.

   Was the hearing of March and June 2005 conducted fairly?

These issues will be considered in turn.

1. CONSTITUTIONALITY

[6] Section 98 of IRPA simply states:

98. *A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.*	***98.*** *La personne visée aux sections E ou F de l'article premier de la Convention sur les réfugiés ne peut avoir la qualité de réfugié ni de personne à protéger.*

[7] The Refugee Convention referred to includes in Article 1F (b) which is the provision pertinent to these proceedings. It states:

> *Article 1. Definition of the term "refugee"*
>
> *[…]*
>
> *F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
>
> *[…]*
>
> *(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
>
> *[…]*
>
> *Article premier. – Définition du terme "réfugié"*
>
> *[…]*

> *F. Les dispositions de cette Convention ne seront pas applicable aux personnes dont on aura des raisons sérieuses de penser :*
>
> *[…]*
>
> *b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;*

[8] Applicant's counsel argues that the phrases "serious reasons for considering" and "serious non-political crime" are vague and are, therefore, invalid as offending the provisions of section 7 of the *Charter of Rights and Freedoms* which requires that there be fundamental justice. Reliance is placed on the Reasons of the Supreme Court of Canada, delivered by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639 to 640:

> *A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient [page640] indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.*

[9] This part of the Reasons must be tempered by what Gonthier J. said in the immediately preceding paragraph at page 639:

> *Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in Sunday Times, supra, and especially the case of Silver and others, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and Malone, supra, at pp. 32-33.*

[10] Article 1F(b) of the Refugee Convention has not, apparently, previously been considered from a constitutional point of view. However, Article 1F(c) was considered by this Court in *Atef v. Canada (Minister of Citizenship and Immigration),* [1995] 3 F.C. 86. In that decision, Wetston J. of this Court reviewed both the *Nova Scotia Pharmaceutical* decision, above, and another case decided by the Supreme Court of Canada in the same year, *R. v. Morales*, [1992] 3 S.C.R. 711. He considered that a provision such as Article 1F(c) cannot be considered as vague simply because it is framed in general terms; flexibility and vagueness are not synonymous. What must be considered is whether the provision confers an unfettered discretion. At pages 107 to 108 of *Atef,* Wetston J. said:

Article 1F(c) will not be found to violate the doctrine of vagueness simply because it is framed in general terms which are subject to interpretations. As the Chief Justice notes in Morales, supra, at page 729, "flexibility and vagueness are not synonymous". What must be determined is whether Article 1F(c) confers an unfettered discretion. As was stated in Nova Scotia Pharmaceutical Society, supra, at page 642, by Mr. Justice Gonthier:

> *What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion.*

Once again, Justice Gonthier, in Morales, supra, at page 754, commented regarding discretion as follows:

> *Consequently, the identification of a measure of discretion conferred by means of a legislative provision cannot alone provide the basis for a constitutional evaluation of that provision. Nor can the identification of possible parameters of that discretion, for a discretion which is referred to as being fettered can be one which is limited not only by appropriate constraints but also by those which are inappropriate or unsuitable. The more important issue which remains, therefore, is what kind of discretion is conferred, and the capacity of the words of the legislative provision to support the type of reasoning which the matter under adjudication requires. [Emphasis added.]*

[11] The jurisprudence, of which there is an abundance, demonstrates that Article 1F(b) has been judicially construed and applied without apparent difficulty, it does not confer an unfettered discretion. It is sufficient to refer to the reasons of the Federal Court of Appeal, delivered by Malone J.A. in *Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraphs 22 to 25 which reviews a number of decisions in this respect:

> ***22*** *This subsection excludes from the definition of Convention refugee any person to which section F of Article 1 of the Refugee Convention applies. The relevant portion of that section reads as follows:*
>
> > *F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: ...*
> >
> > > *(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
> > > *[Emphasis Added.]*
> >
> > * * *
> >
> > *F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser : ...*
> >
> > > *b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;*
> > > *[Je souligne.]*
>
> *While various purposes for Article 1F have been identified by this Court, the primary purpose of this Article is to ensure that perpetrators of serious non-political crimes are not entitled to international protection in the country in which they are seeking asylum (see Décary J.A. in Zrig v. Canada (Minister of Citizenship and Immigration), [2003] 3*

F.C. 761, 2003 FCA 178 at paragraphs 118 and 119). The effect of a board finding that this Article is applicable to a claimant is that the claimant is excluded from accessing the Canadian refugee determination process and cannot therefore be found to be a Convention refugee.

23 *In the recent decision of this Court in Xie v. Canada (Minister of Citizenship and Immigration) (2004), 243 D.L.R. (4th) 385, 2004 FCA 250 at paragraph 23, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 418, S.C.C. Bulletin, 2005, p. 444, it was established that an 'exclusion' hearing under Article 1F(b) is not in the nature of a criminal trial where guilt or innocence must be proven by the Minister beyond a reasonable doubt. Rather, the onus upon the Minister is to establish, based on the evidence presented to the Board, that there are "serious reasons for considering" that Mr. Lai and Ms. Tsang committed serious non-political crimes in China prior to their arrival in Canada.*

24 *Furthermore, pursuant to subsection 68(3) of the former Act, the Board is not bound by any legal or technical rules of evidence. However, in order to receive and base a decision on evidence adduced before it, that subsection requires that the Board receive and consider evidence that is credible or trustworthy in the circumstances of the case. It reads as follows:*

> *(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.*
>
> * * *
>
> *(3) La section du statut n'est pas liée par les règles légales ou techniques de présentation de la preuve. Elle peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.*

> *The requirements of subsection 68(3) of the former Act continue essentially unchanged in the new Act at paragraphs 170(g) and (h).*
>
> ***25*** *Overall, the Board must assess and weigh the evidence that it has accepted as credible or trustworthy in the circumstances and determine whether or not the threshold test of "serious reasons for considering" has been met with regard to the serious non-political crimes alleged (see Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298 at 309, 311 (C.A.)). The standard of evidence to be applied to this threshold test is higher than a mere suspicion but lower than proof on the civil balance of probabilities standard (see Zrig at paragraph 174; and Ramirez v. Canada (Minister of Employment and Immigration), [1992] 2 F.C. 306 at 312-14 (C.A.)).*

[12] There is no vagueness in the wording of Article 1F(b) such as to confer an unfettered discretion. I find that section 98 of IRPA which incorporates by reference Article 1F(b) of the Refugee Convention does not violate the principles of fundamental justice provided for in section 7 of the *Charter*. It is not unconstitutional for vagueness.

2. TRANSLATION

[13] Deng objects not only to the quality of the translation offered by the Board at the hearing held in March and June 2005 but also raises an issue with respect to the hearing that preceded it in respect of a decision not at issue here which hearing was held in November 2003 and January, 2004. His counsel cites the decision of the Supreme Court of Canada in *R. v. Tran*, [1994] 2 S.C.R. 951 where Lamer C.J. for the Court said at page 996:

> *In other words, it is simply beyond the bounds of a civilized society such as ours to permit a person charged with a criminal offence and facing deprivation of liberty who genuinely cannot speak and/or understand the language of the proceedings to dispense either wittingly or unwittingly with the services of an interpreter.*
>
> *Where waiver of the right to interpreter assistance is possible, the threshold will be very high.*

[14] This decision dealt with the right to an interpreter in the first place and waiver of that right. It did not deal with issues as to the adequacy of the translation or interpretation where such facilities were provided.

[15] The Federal Court of Appeal dealt with the quality of interpretation in *Mohammadian v. Canada (Minister of Citizenship and Immigration),* [2001] 4 F.C. 85. Stone J.A. for the Court at paragraphs 18 and 19 said:

> ***18*** *As Pelletier J. observed, if the appellant's argument is correct a claimant experiencing difficulty with the quality of the interpretation at a hearing could do nothing throughout the entire hearing and yet be able to successfully attack the determination at some later date. Indeed, where a claimant chooses to do nothing despite his or her concern with the quality of the interpretation, the Refugee Division would itself have no way of knowing that the interpretation was in any respect deficient. The claimant is always in the best position to know whether the interpretation is accurate and to make any concern with respect to accuracy known to the Refugee Division during the course of the hearing, unless there are exceptional circumstances for not doing so.*

> ***19*** *As I have indicated, in light of his experience at the very first sitting of the Refugee Division the appellant appears to have been well aware of his right to the assistance of a qualified interpreter. When his conduct during the whole of the third sitting and for some time afterward is weighed with his undoubted knowledge of his right, it is difficult to construe that conduct as other than a clear indication that the quality of interpretation was satisfactory to him during the hearing itself. In my view, therefore, Pelletier J. did not err in determining that the appellant had waived his right under section 14 of the Charter by failing to object to the quality of the interpretation at the first opportunity during the hearing into his claim for refugee status.*

[16] In the circumstances of the hearings in question, even the earlier hearings put in issue by Deng, there was no objection raised by Deng or his counsel, an experienced counsel, at the time of the hearings to the Board Member. Deng apparently speaks some English. There is some evidence, equivocal at best, that Deng and the interpreter may have had discussions between themselves as to the quality of the interpretation. Whatever was said, the matter does not appear to have been sufficiently important for Deng or his counsel to raise the matter before the Board.

[17] The issues respecting translation of interpretation now raised even if accurate do not appear to rise to a level that would lead this Court to conclude that they had a material effect on the proceedings or decisions of the Board in either decision. In the latter decision, the one at issue here, there was some confusion as to when a person was imprisoned and when that person died. That confusion was ultimately cleared up and nothing turns upon it.

3. ADJOURNMENT

[18] The chronology of events as set out in the Appendix shows that the Minister disclosed to Deng in July 2004, September 2004 and February 2005 the materials in its possession relevant to the hearing to be held later in 2005. The hearing began March 16, 2005 at which time Deng's counsel sought an adjournment until June 2005 to permit Deng to gather evidence respecting the allegations as to serious crimes.

[19] At pages 1478 and 1479 of the Tribunal Record, which are pages 7 and 8 of the transcript of the March 16 2005 hearing, Deng's counsel explains that he should have requested an extension in February but, due to illness, he was unable to do so. He sought leave to request an extension until June 2005. He said, in part:

> *So, what is the outcome here? Instead of making the submission in writing I've made the submission today, to put it on the record. So, instead of – I don't know how much I was going to ask for, but let us say I'd been asking until July to see if we could controvert this material, give us to June, because of my fault. I still would have requested the adjournment on this section of exclusion, because it's simply not fair.*

[20] As a result, the matter was put over until June as requested. On June 9, 2007, Deng's counsel made a further request for an adjournment which was denied. This was addressed in the Board's reasons at page 10:

> *Prior to the resumption of the hearing on June 21, 2005, counsel made an application, on June 9, 2005, requesting a postponement of the hearing to sometime in September 2005. Counsel wrote that his clients needed more time to obtain evidence to rebut the allegations of the MC. The application was*

> *denied considering that the claimants had had enough time to procure the documentary evidence to rebut the MC's evidence. MC had made his first documentary disclosure as far back as July 12, 2004 with the latest disclosure on February 7, 2005, more than a month ahead of the first sitting on March 16, 2005. Furthermore, the claimants had more than three months since the first sitting, at the end of which MC had completed his examination of Mr. Deng. Given the above, notwithstanding that the claimants were familiar with the allegations levelled against them at the admissibility hearings, it was therefore reasonable to conclude that the claimants had more than ample time to procure the rebuttal evidence. Furthermore, postponement of the hearing would not have been fair and would not have served the interests of the judicial system. The RPD is obliged to conduct hearings expeditiously with efficiency, but fair to the claimants.*

[21] The hearing concluded on June 21, 2005 and the parties were given an opportunity to provide written submissions which the Refugee Protection Officer and Minister did on June 29 and July 15 respectively. Deng changed counsel in July 2005.

[22] On July 28, 2005, Deng's new counsel made an application under Rule 44 of the Refugee Protection Division Rules for a variety of relief including a request for provision of tapes and transcripts. The Notice requested among other things:

> *4. That, after the tape recordings and transcripts have been made available to the applicant's counsel, a date be set for resumption or continuation of the herein proceeding, as the case may be, when the applicant be permitted, to present evidence in full, oral and/or documentary, to support his claim;*

[23] The application was supported by an affidavit of Deng which, among other matters, addressed the issue of documents expected to come from China at paragraph 9:

> *I have never been in jail for any crime in China and I did not defraud anyone by posing as agents of China Life Insurance Company. This is the absolute truth. I am expecting official documents from China which will support my position and prove that some of the documents provided by the Chinese government to the Minister are false. For instance, I expect to receive an authentic document from China which refutes the Verdict on page 59 to 63 (Chinese), to 64 to 68 (English translation) of the Minister's materials (M-4). Attached hereto as* ***Exhibit A*** *is the Verdict and its translation. I expect the new document to be identical to the judgment in almost all material respects except for the fact that my name was not on it. I must indicate that, although I made the above assertion based on reliable sources, I have not seen this document which is now on its way to Canada.*

[24] It appears that some documents did come. They were not filed with the Board in any proper way. Instead, they were attached to a Reply filed by Deng's counsel in the course of the Rule 44 application. Those documents do not address the "serious crime" matter at issue which was an alleged insurance fraud scheme commencing in about 1998 but rather an earlier matter in which Deng was alleged to be implicated in 1988. The documents provided by Deng are alleged to address his assertions that the 1988 documents coming from China had been altered to insert his name improperly in Court related documents whereas, according to Deng, the true documents named someone else.

[25] The Board considered the Rule 44 application and rejected it finding that Deng had not exercised due diligence and his application failed to demonstrate why the material could not have been submitted earlier. At pages 19 and 20 of its Reasons, the Board said:

> *New counsel submitted several unsolicited documents in support of the claim of Mr. Deng as part of his reply to the MC's submissions concerning the issues raised in his application of July 28, 2005, pursuant to Rule 44 of the RPD Rules. The said "Reply" ring binder document was received by the RPD on August 12, 2005. As the aforesaid documents were submitted post-hearing and considering that the hearing concluded on June 21, 2005, the submission did not comply with Rule 37 of the RPD Rules. According to this Rule, the claimant must file an application explaining why these documents could not have been submitted earlier, before the commencement of the hearing, as required by Rule 29, and their relevance. These documents, purportedly originated in July 2003, and earlier, going back to the year 1988 (excluding the dates of certification issued by certain individuals in China at the request of the claimant). As stated, the claimant arrived in Canada on January 24, 2004 and sought refugee protection on August 12, 2003. MC has disclosed all of the evidence that he was relying upon, to argue exclusion by February 7, 2005 and on three different occasions starting in July 2004. This was notwithstanding that the claimant was already familiar with the main thrust of the adverse evidence that he was up against, because of the admissibility hearing in the year 2004. The claimant had legal representation right from the day of his PIF preparation to the end of the refugee hearing on June 21, 2005. His first legal counsel sought and obtained a postponement of the hearing scheduled on July 16, 2004, citing lack of sufficient time to prepare. As such, the claimant had ample time to procure the documents much earlier than he did. The claimant had not provided any credible proof that he made diligent efforts to obtain the documents. Further, as the documents are submitted after the hearing, the panel is not in a position to*

> *examine and adduce evidence on these documents to determine their relevance and probative value. Neither is the post-hearing disclosure fair to the other party to the proceeding. Given the above, the panel makes a finding that the claimant has not exercised due diligence. The panel, for all of the aforesaid reasons, determines that the claimant has failed to comply with Rule 37(1) and, therefore, the new documents are not entered into evidence.*

[26] The Court, upon a judicial review, must have respect for decisions made by a Board in respect of its own procedure. As set out in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-69, a court should only intervene where there has been a breach of procedural fairness or natural justice:

> *Powers of the Adjudicator*
>
> *In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own [page569] house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.*

[27] Here the Applicant Deng was given ample opportunity to know the Minister's case and assemble appropriate materials in reply. One adjournment had already been given to a date asked for by Deng's counsel. The manner in which the new material was eventually sought to be introduced was procedurally flawed. Deng never gave any evidence as to why the material was not obtainable earlier.

[28] The material in any event does not go to the heart of the issue. If valid, the documents would only go to challenge whether or not Deng was convicted of an office in 1988. That alleged offence is not at issue here.

[29] Counsel for Deng asserts that the allegations of the 1988 offence serve to colour the case against his client and bolster issues of credibility against Deng. Given the findings of the Board particularly as set out at pages 45 and 46 of its Reasons that there were a "myriad of contradictions, inconsistencies and failure to mention significantly material pieces of evidence", the 1988 issue was but a small part of this picture and not significant to the overall assessment of credibility. It was not mentioned by the Board at all in coming to its conclusions as to Deng's credibility.

[30] Therefor, I find that the refusal to grant a further adjournment or failure to accept further documents by the Board does not constitute a basis for setting the decision aside.

4. BIAS

[31] Deng alleges that the fact that the Board had before it the decision of the Immigration Division of May 13, 2004, in which he was found to be inadmissible caused the Board to be biased in coming to the decision now under review.

[32] The Board, at page 13 of its Reasons made it clear that it was not considering the earlier hearing. There is no evidence or compelling submission from Deng or his counsel that would lead

this Court to conclude, or even reasonably to suspect that the Board was influenced by the earlier decision.

[33] Judicial bodies every day deal with matters and persons that may have been subjected in one way or another to an earlier determination of some sort. The fact that the judicial body was aware of these matters does not, without a clear indication to the contrary, mean that improper bias resulted.

[34] A review of the transcript and the Reasons given by the Board leads to the overwhelming conclusion that the Board was not only fair and indulgent to Deng and his counsel but went overboard in many instances when there was no need to do so. No bias against Deng or his counsel has been demonstrated.

5. FAIR HEARING

[35] Deng argues that, all in all, he did not get a fair hearing. This argument is simply a summary of the foregoing issues 2 to 4. Deng received a fair hearing.

FINDINGS OF THE BOARD

[36] While the specific issues raised by Deng have been discussed, the substantive findings by the Board must be remembered. It is abundantly clear that, for a variety of reasons, the Board did not find the evidence of Deng to be credible. It is further abundantly clear that there was a good

deal of procedural activity in the case and that the Board exercised an indulgent but firm control over the proceedings.

[37] There is a second branch to the proceedings, that of Deng's claim for refugee status based on his alleged fear of severe reprisals from the Chinese authorities by reason of his alleged membership in Falun Gong and alleged donation of some $20,000 to an illegal church. At page 50 of its Reasons, the Board summarized its findings in stating that, even absent the exclusion decision, the Refugee Protection Division determined that Deng was not a Convention refugee or person in need of protection. Deng did not challenge this finding in this Court. The Minister's counsel was invited to consider whether this was sufficient to dismiss Deng's application. That invitation was declined as the Minister wished to engage the issues raised in respect of the exclusion decision. Thus, these reasons address these matters.

CERTIFICATION

[38] Deng's counsel requested certification of one or more questions. The Minister's counsel requested none.

[39] Paragraph 74(d) of IRPA provides that a question should only be certified if it is a "serious question of general importance." The nature of such a question has been considered by the Federal Court of Appeal in *Liyanagajage v. Canada (Minister of Citizenship and Immigration)*, (1994) 176 N.R. 4 at pages 5 and 6 and by this Court in *Chu v. Canada (Minister of Citizenship and Immigration)* (1986), 116 FTR 68 at paragraph 2. Both cases rely upon the decision of the late

Justice Catzman of the Ontario High Court (as he then was) in *Rankin v. McLeod Young, Weir Ltd.* (1986), 57 O.R. (2d) 569 where he found, in respect of a similar provision in the Ontario Rules that the question should be one that *"contemplates issues of broad significance or general application that are felt to warrant resolution by a higher level of judicial authority"* (page 575).

[40] All issues save that of constitutionality raised in this application are sufficiently fact specific such that a certification would not be appropriate. However, the constitutionality issue is of sufficient general importance such that consideration by the appeal court is appropriate, that is, it is a "serious" question (and I note that the word "serious" appears in paragraph 74(d) of IRPA as it does in Article 1F(b) of the Convention). Therefore, the following question will be certified:

> "Do the provisions of section 98 of the *Immigration and Refugee Protection Act* to the extent that they incorporate the provisions of Article 1F(b) of the Refugee Convention violate the provisions of section 7 of the *Charter of Rights and Freedoms* in failing to provide fundamental justice by reason of vagueness."

COSTS

[41] No party requested costs and none will be awarded.

JUDGMENT

For the Reasons given:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed

2. The following question is certified:

> "Do the provisions of section 98 of the *Immigration and Refugee Protection Act* to the extent that they incorporate the provisions of Article 1F (b) of the Refugee Convention violate the provisions of section 7 of the *Charter of Rights and Freedoms* in failing to provide fundamental justice by reason of vagueness"

3. No costs are awarded.

"Roger T. Hughes"
Judge

APPENDIX

Date	Event
1987	Cui is allegedly criminally convicted of theft and larceny in China.
August 1988	A People's Court Conviction Order is allegedly issued against Deng in China.
1998 to 2002	Cui and Deng allegedly sell fictitious insurance policies in China.
2002	The Chinese government charges Deng with fraud.
January 24, 2003	Cui and Deng are admitted to Canada on six-month visitor's visas, after spending a week in New Zealand.
March 7, 2003	A warrant is issued by the Chinese authorities for Deng's arrest relating to three fraudulent transactions.
April 14, 2003	Cui and Deng's visitor's visas expire.
April 22, 2003	Interpol arrest warrants are issued against Deng and Cui.
May 20, 2003	Cui and Deng apply to extend their stay in Canada up to the end of 2003. Their applications are denied.
August 12, 2003	Cui and Deng file inland claims for refugee protection.
August 21, 2003	Cui and Deng are arrested and detained for admissibility hearings.
November 2003 to January 26, 2004	An admissibility hearing is held before the Immigration Division of the Immigration and Refugee Board to determine if Deng is inadmissible for criminality.
April 8, 2004	Deng attends an interview with an immigration officer concerning his refugee claim.
May 13, 2004	The Immigration Division finds Deng inadmissible for serious criminality (under *IPRA* s. 36(1)(c)).
June 24, 2004	The Immigration Division finds Cui not inadmissible. The Minister appeals.
July 2, 2004	The Chinese government issues four Notices of Annulment and forwards them to the Canadian government (allegedly in response to a request made by the Canadian government to confirm the authenticity of Notarial Certificates that

	stated neither Cui nor Deng had a criminal record in China). The Notices of Annulment allegedly demonstrate that the Notarial Certificates were based on false documents as Cui and Deng were criminally convicted in China in the late 1980s.
July 12, 2004	The Minister serves a Notice of Intent to Participate in Cui and Deng's Refugee Protection Division (RPD) hearings. This is the first of three disclosures made by the Minister.
	Cui and Deng's RPD hearings are scheduled to be heard on July 26, 2004. The Minister's counsel makes an application pursuant to Rules 44 and 48 of the *Refugee Protection Division Rules* to join Cui and Deng's claims.
July 15, 2004	Counsel for both Applicants, Weisdorf, requests an adjournment because of personal medical reasons. He requests a resumption date after March 16, 2004.
July 22, 2004	The RPD notifies the Applicants' counsel, Weisdorf, that Cui and Deng's claims will be joined. The Minister requests a postponement of the July 26, 2004, hearing date. In light of this request and Weisdorf's request on July 15, 2004, the hearing is postponed and eventually rescheduled for March 16, 2005.
September 22, 2004	The Minister files its second of three disclosures in respect of the RPD hearing.
February 7, 2005	The Minister files its final disclosure in respect of the RPD hearing.
March 16, 2005	Deng's refugee hearing begins (it continues on June 21, 2005). At the outset of the hearing, the Applicants' counsel brings a motion seeking to postpone the hearing until June 2005. He argues that the Applicants did not have enough time to gather evidence to rebut the Minister's extensive evidence respecting non-political crimes, particularly given counsel's illness. The Minister's counsel advises that his examination will take at least a day, and thus the hearing would need to be adjourned to another date that would be at least 3 months away - thus, giving the Applicants' counsel additional time to gather and disclose documents and make further submissions.
June 9, 2005	Deng's counsel requests that the June 21, 2005, hearing date be postponed until September to permit him to obtain rebuttal evidence against the Minister's allegations, namely the criminal convictions and sentence in 1988. The request is refused.

June 21, 2005	Deng's Refugee Hearing is completed. The RPD establishes deadlines for filing further written submissions.
June 24, July 15	The RPO and Minister file written submissions following the RPD hearing.
July 2005	Deng retains new counsel, Hung.
July/August 2004	A lawyer in China (retained by Deng) obtains documents allegedly demonstrating that the Criminal Verdict obtained by the Minister was a forgery (these documents were presented in an affidavit filed on August 12 as part of a Rule 44 "Reply").
July 28, 2005	Deng's new counsel, Hung, makes a written application, pursuant to Rule 44 of the RPD rules raising new issues that include a request for an oral hearing and question the constitutional validity of section 98 of *IPRA*.
August 4, 2005	The Minister opposes Deng's change of counsel of record at the last minute.
August 9, 2005	The Minister files written submissions in response to Deng's July 28, 2005, Notice of Application.
August 12, 2005	Deng's new counsel files a Reply to the Minister's submissions of August 9, 2005. New evidence is attached to this Reply, including documents obtained by Deng's lawyer in China that suggest the document confirming the 1987 Criminal Verdict was a forgery. Applicants' deadline for filing written submissions for the RPD hearing. Nothing is filed by this date by Cui's counsel.
August 18, 2005	The Minister opposes the RPD accepting Deng's unsolicited post-hearing evidence, and notes that Deng has failed to comply with Rule 37 of the *Refugee Protection Division Rules*.
October 5, 2005	Deng receives notice that the RPD has refused to consider the materials that he filed on August 12, 2005. Deng is given until October 21, 2005, to file written submissions in response to this decision.
October 11, 2005	Deng files an Application for Leave and Judicial Review of the October 5, 2005, interlocutory decision of the RPD where the member refused to consider the materials he filed on August 12, 2005. Deng requests a *de novo* hearing, an order prohibiting the RPD member from continuing to hear his claim, and requests that the Federal Court assess the constitutionality of section 98 of IRPA.

October 21, 2005	Deng files a motion in the Federal Court seeking an order suspending the RPD proceeding until his Application for Leave and Judicial Review can be determined. The motion was heard on November 14, 2005.
November 17, 2005	Justice Gibson dismisses Deng's motion filed on October 21, 2005, and finds that the Application for Leave and Judicial Review underlying the motion (filed October 11, 2005) was ill-founded.
June 13, 2006	The RPD issues its reasons for decision, finding Deng inadmissible under section 98 of *IPRA* (that incorporates Article 1F(b) of the Convention). The RPD also rejects Deng's Rule 44 application.
July 18, 2006	Deng files an application to reopen the refugee hearing (with extensive supporting materials).
August 11, 2006	The RPD rejects Deng's application to have his refugee hearing reopened. No reasons were provided.
August 21, 2006	Deng files an Application for Leave and Judicial Review of the RPD's decision dated October 5, 2005, in which the member refused to accept the additional materials submitted by Deng after the completion of the hearing. A Notice of Constitutional Question is filed on August 22, 2006.
November 24, 2006	The RPD issues its reasons for decision, finding Cui inadmissible under section 98 of *IPRA* (that incorporates Article 1F(b) of the Convention).

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4071-06
STYLE OF CAUSE:	XINZHI DENG and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September, 17, 2007
REASONS FOR JUDGMENT AND JUDGMENT :	Hughes J.
DATED:	September 20, 2007

APPEARANCES:

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Ms. Catherine Vasilaros	FOR THE RESPONDENT

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