

Date: 20071001

Docket: IMM-3231-06

Citation: 2007 FC 990

Ottawa, Ontario, October 1, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

FENG YI QIAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated May 25, 2006, wherein the Board determined that the applicant was neither a Convention refugee nor a person in need of protection.

[2] The applicant requests that the decision of the Board be declared invalid, quashed, or set aside and referred for redetermination to a differently constituted panel of the Board.

Background

[3] Feng Yi Qian, the applicant, is a citizen of China. He alleged having a fear of persecution by the Chinese authorities on the basis of his status as a practitioner of Falun Gong. The circumstances which led to the applicant's claim for refugee protection were set out in the narrative portion of his Personal Information Form (PIF). He allegedly began practicing Falun Gong on March 12, 2004 because he was suffering from a stomach problem. The practice of Falun Gong cured his health problems, and the applicant continued to engage in the practice.

[4] The applicant claimed that he joined a Falun Gong group and distributed Falun Gong leaflets. On March 26, 2005, the Public Security Bureau (PSB) allegedly raided his practice group, but the applicant managed to escape and go into hiding. The applicant was later informed that two fellow Falun Gong practitioners had been arrested and sentenced to jail. He therefore feared suffering the same fate. The applicant alleged that the PSB continue to look for him and have advised his family that they intended to charge him. As a result, he escaped China and arrived in Canada on May 28, 2005.

[5] The applicant claimed refugee status on June 1, 2005. The applicant's refugee hearing took place on April 19, 2006, and his claim was refused by decision of the Board, dated May 25, 2006. This is the judicial review of the Board's decision.

Board's Decision

[6] The Board concluded that, on the balance of probabilities, the applicant was not a Falun Gong practitioner because he lacked knowledge of basic Falun Gong philosophy. The Board gave four reasons for having reached this conclusion:

1. When asked to perform the fourth exercise, the applicant touched his body on at least four occasions. Practitioners cannot touch themselves during this exercise as the energy in the hands will be taken back into the body.
2. The applicant could not correctly state the universal principle of Falun Gong.
3. The applicant could not correctly state what happened when one reached the perfect state according to Falun Gong teachings.
4. The applicant stated that it took 10 minutes to do the fourth exercise but when he performed it, it only took 2 minutes. The applicant stated that he had performed a condensed version and that if he had done the exercise three times, as should have been done, then it would have taken 10 minutes. The Board found that there was no indication in the documentary evidence that the exercise was to be repeated three times.

[7] The Board also held that it was implausible that the PSB was interested in arresting the applicant because it did not believe that he had distributed Falun Gong flyers. The applicant had

stated that on ten occasions he delivered approximately 250 Falun Gong flyers to apartments buildings at around 7 p.m. He claimed that he was not seen by anyone on any of these occasions because it was dinnertime and the national news was on. The Board found it implausible that no one would have seen him, given that people would be returning home from work or shopping at that time.

[8] The Board drew a negative inference from the fact that the applicant was unable to state what was written on the flyers. He gave a vague answer that the flyers told the truth about the Tiananmen self-immolation incident, which he maintained took place in October 2001. The Board noted that the incident had in fact taken place on January 23, 2001. When confronted with this fact, the applicant stated that that he might have seen too many flyers, and that he did not really read the flyers, as he has a limited education. The Board noted that the applicant had submitted letters written by his father and held that he must have been able to read at least parts of the flyers.

[9] The Board determined that the applicant was neither a Convention refugee, nor a person in need of protection.

Issue

[10] The issue to be determined is:

Did the Board err in finding that the applicant was not a practitioner of Falun Gong?

Applicant's Submissions

[11] The applicant submitted that the Board's findings with respect to whether he was a Falun Gong practitioner were patently unreasonable. The applicant stated in his affidavit that he did not touch his body while performing the fourth exercise and noted that the Board member was 10 to 15 feet away while he was performing the exercise.

[12] The Board found that the applicant could not correctly state the principle of Falun Gong. The Board stated that the correct answer was "Truthfulness, Compassion and Forbearance". The applicant submitted that the Board's finding was not based on any documentary evidence that was before it, and noted that the Board failed to cite any documentary evidence before it. It was noted that this question was not in the "Question and Answer" series about Falun Gong included in the documentary material.

[13] Likewise, the applicant submitted that the Board's statement that the correct answer to the perfect Falun Gong state was "when the celestial eye opens", was not supported by any of the documentary evidence. The applicant acknowledged that there was information about the opening of the celestial eye in the documentary evidence, but noted that it did not state that the opening of the celestial eye was the perfect state. The applicant noted that the Board again failed to cite a source for this answer.

[14] The applicant submitted that the documentary evidence supported his testimony to the effect that the fourth exercise was meant to be done more than once, and that the documentary evidence stated that the movement can be repeated more than nine times as long as it was a multiple of nine.

[15] The applicant stated in his affidavit that during the course of the hearing, he correctly named the fifth exercise of Falun Gong, and correctly testified that the exercise should take approximately one hour. He also correctly testified that the Falun was located in the abdomen, it turned either clockwise or counter-clockwise when performing the exercises, and it kept turning even when one was not practicing. He testified that Master Li stated that one can seek medical treatment for medical ailments. Finally, he correctly testified that a practitioner was to imagine themselves as two empty barrels when performing the third exercise.

[16] Finally, the applicant submitted that he could not read the Falun Gong flyers, but could read the letters from his father because the flyers used more sophisticated language.

Respondent's Submissions

[17] The respondent submitted that the applicable standard of review for issues of credibility is patent unreasonableness (see *Chen v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 165, 49 Imm. L.R. (2d) 161 (F.C.A.)). It was submitted that negative credibility decisions are properly made, so long as the Board gives reasons for so doing in clear terms. The respondent submitted that the Board may base a negative credibility finding upon contradictions,

inconsistencies and implausibilities in a claimant's testimony, and can also rely on criteria such as rationality and common sense (see *Leung v. Canada (Minister of Employment and Immigration)* (1990), 74 D.L.R. (4th) 313, 129 N.R. 391 (F.C.A.)).

[18] The Board stated that the applicant touched his body on four separate occasions. The respondent submitted that the Board member was a disinterested observer and had no reason to state that the applicant touched his body during the fourth exercise if he had not in fact done so. The applicant claimed that it would take ten minutes to perform the exercise, but he only took two minutes to perform the condensed version. He also claimed that the exercise could be done three times. The Board noted that the exercise was to be performed in multiples of nine, not three.

[19] With respect to the Board's question about the universal principle of Falun Gong, the respondent did not set out which documentary materials stated that the universal principle was "truth, compassion and forbearance", but rather submitted that the materials in the National Documentation Package treated these three principles as synonymous with the practice of Falun Gong.

[20] The respondent submitted that the applicant's answer about the perfect state was incorrect, and that he should have mentioned the opening of the celestial eye, as it was a central tenet of the practice of Falun Gong, and was essential for the spiritual development of a practitioner. With respect to the number of times the fourth exercise should be performed, the respondent submitted

that nowhere in the documentary evidence did it state that the exercise could be performed three times but rather, it stated that the exercise could be repeated in multiples of nine.

[21] The respondent submitted that the applicant provided implausible and contradictory testimony regarding the distribution of Falun Gong flyers. The Board correctly noted that the applicant was unable to state the date of the Tiananmen self-immolation incident, which was featured on the flyers he had allegedly delivered. The Board did not accept the applicant's explanation for not knowing the date of the incident, as he was able to read a letter from his father. It was noted that the applicant testified to the effect that he had not read the pamphlets, and that he had read too many pamphlets, in order to explain the error with respect to the date. Finally, the respondent submitted that even if some of the Board's findings with respect to credibility were unreasonable, the fact that the remaining findings were reasonable meant that the decision should not be set aside (see *Anthonipillai v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1774 (F.C.T.D.)).

[22] The respondent noted the applicant's concern that the Board had made findings regarding the practice of Falun Gong without citing documentary references. It was submitted that during the hearing, the Board disclosed its use of specialized knowledge regarding Falun Gong from its experience with Chinese claims, pursuant to Rule 18 of the *Refugee Protection Division Rules*, S.O.R./2002-228. The respondent submitted that the Board met its document disclosure requirement by providing the RPD Index for China version 9 November 2005 (see *Hassan v. Canada (Minister of Employment and Immigration)* (1993), 151 N.R. 215 (F.C.A.)).

[23] The respondent noted that under the former *Immigration Act*'s equivalent provisions, the Court held that simply informing the applicant of the use of specialized knowledge at the hearing was sufficient (see *Elmi v. Canada (Minister of Citizenship and Immigration)* (1999), 163 F.T.R. 122, 50 Imm. L.R. (2d) 89 (F.C.T.D.)). It was submitted that the applicant and his counsel were given a chance to make representations regarding the Board's use of specialized knowledge, but failed to do so.

Analysis and Decision

Standard of Review

[24] The Board's finding that the applicant was not a practitioner of Falun Gong was factual in nature, and is subject to review on the standard of patent unreasonableness (see *Chen* above).

[25] **Issue**

Did the Board err in finding that the applicant was not a practitioner of Falun Gong?

The Board noted the following issues in determining that the applicant was not a practitioner of Falun Gong: (1) his performance of the fourth exercise, (2) his answer to questions regarding basic principles of Falun Gong and (3) the circumstances under which he distributed Falun Gong flyers.

His performance of the fourth exercise

[26] The Board's decision indicated that the applicant touched his body four times while performing the fourth exercise. However, a review of the transcript of the hearing shows that the member stated that the applicant touched his jacket four times during the exercise. The practice guide states that a practitioner's hands should be no more than 10 cm from the body during the practice. The refugee protection officer stated the following in closing remarks:

Finally, as to the claimant's current practice of Falun Gong, I have no concerns. In my observation, he was able to perform the exercises in a fairly fluent fashion. I wasn't concerned with the hitting of the jacket. I don't see how he could have performed that exercise without kind of bumping into his jacket, so, I have no concern with respect to his current practice of Falun Gong. And, I also note that we have a number of photographs in – showing the claimant at various demonstrations and so on.

(Tribunal Record, page 173)

[27] I am satisfied from the evidence taken as a whole that it has not been established that the applicant touched his body four times during the exercise.

[28] The Board drew a negative inference from the applicant's statement that the fourth exercise took ten minutes when it only took him about two minutes to perform it. A reference to the transcript of the hearing shows that the applicant asked the Board before he commenced the exercise whether the Board wanted the whole exercise or the condensed version. The Board did not answer his question. The exchange reads as follows:

Q. Do you know the fourth exercise?

INTERPERTER: Fourth one?

Q. The fourth, yes.

A. Falun (inaudible), Falun Heavenly Circulation exercise.

Q. So, can you demonstrate that exercise for us?

A. Yes.

Usually, that would take 10 minutes. Do you want me to do the whole thing or should be condensed form, or...

Q. Condensed form.

MEMBER: Just demonstrate the exercise, please. That's what you've been asked to do.

(SHORT PAUSE FOR DEMONSTRATION OF EXERCISE)

(Tribunal Record, page 142)

[29] From my review of the evidence, I am of the view that the applicant was aware of the number of times that the exercise had to be performed.

[30] Considering that the applicant asked to do the shorter version and that the refugee protection officer stated that the officer had no concern about the applicant's practice of Falun Gong. I find the Board committed an error in drawing a negative inference against the applicant based on the time taken by the applicant to do the exercise.

[31] The Board found that the applicant did not distribute Falun Gong flyers. Making this finding, the Board rejected the applicant's submission that no one saw him distribute the flyers, and relied on the applicant's incorrect answer as to the date of the Tianannen Square self-immolations. The Board was in error as the transcript shows the applicant testified that he bumped into people when distributing the flyers. The transcript also shows that the applicant candidly said he did not know the date of the Tianannen Square incident. It was only when he was asked for an approximate date that he provided the wrong date. I am of the view that it was patently unreasonable for the Board to ignore this evidence.

[32] Based on my findings above, I am of the view that the cumulative erroneous findings of the Board result in the Board's decision being patently unreasonable. The decision is set aside and the matter is referred to a different panel of the Board for redetermination.

[33] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[34] **IT IS ORDERED that** the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

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

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| <p>96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p> <p>97.(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of</p> | <p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p> <p>97.(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au</p> |
|--|---|

Article 1 of the Convention
Against Torture; or

sens de l'article premier de la
Convention contre la torture;

(b) to a risk to their life or to a
risk of cruel and unusual
treatment or punishment if

b) soit à une menace à sa vie ou
au risque de traitements ou
peines cruels et inusités dans le
cas suivant:

(i) the person is unable or,
because of that risk, unwilling
to avail themselves of the
protection of that country,

(i) elle ne peut ou, de ce fait, ne
veut se réclamer de la
protection de ce pays,

(ii) the risk would be faced by
the person in every part of that
country and is not faced
generally by other individuals
in or from that country,

(ii) elle y est exposée en tout
lieu de ce pays alors que
d'autres personnes originaires
de ce pays ou qui s'y trouvent
ne le sont généralement pas,

(iii) the risk is not inherent or
incidental to lawful sanctions,
unless imposed in disregard of
accepted international
standards, and

(iii) la menace ou le risque ne
résulte pas de sanctions
légitimes — sauf celles
infligées au mépris des normes
internationales — et inhérents à
celles-ci ou occasionnés par
elles,

(iv) the risk is not caused by the
inability of that country to
provide adequate health or
medical care.

(iv) la menace ou le risque ne
résulte pas de l'incapacité du
pays de fournir des soins
médicaux ou de santé adéquats.

(2) A person in Canada who is a
member of a class of persons
prescribed by the regulations as
being in need of protection is
also a person in need of
protection.

(2) A également qualité de
personne à protéger la personne
qui se trouve au Canada et fait
partie d'une catégorie de
personnes auxquelles est
reconnu par règlement le besoin
de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3231-06

STYLE OF CAUSE: FENG YI QIAN

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 15, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: October 1, 2007

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