

Date: 20080107

Docket: IMM-5468-06

Citation: 2007 FC 1339

Ottawa, Ontario, January 7, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**PIN XIAN XIN
(a.k.a. PINXIAN XIN)**

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Pin Xian Xin, applies for a judicial review of the decision by the Refugee Protection Division of the Immigration and Refugee Board [“the Board”] issued on September 18, 2006, wherein it was determined that the applicant was neither a Convention Refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [“*IRPA*”].

[2] The Board determined that the applicant was not credible and that she failed to establish that she would be persecuted on any convention ground or that there was a serious possibility that she would suffer serious harm if she were returned to China.

[3] This application for judicial review is made pursuant to subsection 72(1) of *IRPA*. The applicant says that she fears she will be persecuted for being a member of an underground Christian church and for having a second child contrary to China's one child policy. She sought leave and judicial review on two main grounds:

- a. that the Board erred when it decided that the applicant was not credible and determining that she was not, nor is now, a Christian; and
- b. that the Board erred when it decided that the applicant did not face a serious possibility that she would suffer harm if she were returned to China because she had a second child contrary to China's one child policy.

Nature of the Order Sought by the Applicant

[4] The applicant seeks the following:

- a. An order declaring the applicant to be a Convention Refugee;
- b. In the alternative, an order remitting the matter to the Board with directions;
- c. In the further alternative, an order remitting the matter to a different panel of the Board for a hearing *de novo*.

[5] In *Marsh v. Canada (Royal Canadian Mounted Police)*, [2006] F.C.J. No. 1854, Justice Dawson stated at paras 45-46:

I accept that pursuant to this grant of jurisdiction there are circumstances in which the Court will issue directions on an application for judicial review that are so specific that they will compel the federal board, tribunal or commission to reach a specific conclusion. See, for example, *Turanskaya v. Canada (Minister of Citizenship and Immigration)* (1997), 145 D.L.R. (4th) 259 (F.C.A.). In *Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 this Court considered when such specific direction should be given. At paragraph 18, the Court considered the relevant factors to be:

- Is there evidence on record that is so clearly conclusive that there is only one possible conclusion?
- Is the sole issue to be decided a pure question of law which will be dispositive of the case?
- Is the legal issue based on uncontroverted evidence and accepted facts?
- Is there a factual issue which involves conflicting evidence which is central to the claim?

In my view, for the following reasons, the present case is not one that fits within the above criteria for giving specific directions.

[6] In the case at hand, a central issue is whether the Board was patently unreasonable in finding the applicant not credible. As such, facts are at issue and, therefore, this case is not one that meets the criteria for giving specific directions, let alone issuing a declaration.

[7] With respect to the request for a hearing *de novo*, for reasons set out as follows, I find that the Board erred in its determination that the applicant was not credible. The decision will be quashed and the matter referred to a differently constituted Refugee Protection Division Board for re-determination.

Standard of Review

[8] The Board has expertise in determining questions of fact, including evaluating the credibility of refugee claimants. Such determinations are at the core of the Board's legislative jurisdiction. Questions of credibility rest on the fact-finding process of the Board. Applying these factors to the pragmatic and functional approach determines that the appropriate standard of review for decisions by the Board on credibility is patent unreasonableness, (*Aguebor v. Canada Minister of Employment and Immigration*) (1993), 160 N.R. 315 (F.C.A.)).

[9] For reason given below, I need not determine the standard of review for decisions by the Board on risk of return.

Background

[10] The applicant is a 32-year-old citizen of the People's Republic of China. She was born in Banhu Town, Guangzhou, Guangdong Province. She has eight years of formal education and required the services of a Cantonese translator throughout including instructing counsel, completing the Personal Information Form ["PIF"] and testifying at the Board hearing.

[11] She alleges she has a fear of persecution at the hands of the Chinese authorities due to her being a member of an unregistered Protestant Church known as an underground church or house church and due to her violation of China's one-child policy.

[12] In her PIF narrative dated November 8, 2005, the applicant stated that she was introduced to the underground church in March 2000 by Shu Ying Yang, her female cousin, who cautioned

her against talking to other people about going to the underground church because of the unfavourable view held by Chinese authorities of the underground church relative to the State church. The applicant stated that she enjoyed the church experience and regularly attended the underground church gatherings held at private homes of different members. In October 2001, she married Shu Pei Su who was not a Christian. After her marriage, the applicant gave birth to a son and she was required to wear an IUD (a birth control device) and attend regular IUD check-ups.

[13] The applicant's husband did not attend the underground church and worried about her safety as a result of her participation. The applicant was baptized in April 2001. In December 2002, worried that her participation in the underground church would be discovered, the applicant's husband arranged for the applicant to obtain a visitor visa to another country with the assistance of a snakehead. The several attempts to obtain a visitor's visa, made in 2002, 2003 and 2004, were unsuccessful.

[14] The applicant became pregnant again in August 2005. Contrary to China's one-child policy, the applicant and her husband decided to keep the baby. Fearing discovery by the Chinese health authorities of the impending birth of their second child, the applicant's husband sent her to another region so as to avoid scheduled IUD check-ups. Chinese family planning officers were making inquiries about her, advising her husband that she was to report for an IUD check-up. A male cousin successfully arranged for a snakehead to take her out of the country.

She made a claim for protection soon after her arrival to Canada. The applicant gave birth to her second child, a girl, on February 17, 2006.

[15] The applicant stated she feared she would be forced to undergo an abortion and sterilization if returned to China. She also stated she would not be able to practice her religion openly as she can in Canada.

[16] At the Board hearing on June 30, 2006, the applicant testified through a Cantonese interpreter. The applicant was questioned by the Refugee Protection Officer, the Board member, and the applicant's own counsel.

[17] The applicant was questioned, among other subjects, about her knowledge of Christian beliefs, about her knowledge of the Chinese state-approved Patriotic Church, about the disclosure of her participation in the underground church to her husband, about a supportive letter provided by a Canadian Christian church pastor, and about the possible consequences of having a second child in China.

The Board's Reasons for Decision with Respect to the Applicant's Professed Christianity

[18] The Board stated:

An issue to be resolved is whether the claimant is a genuine Christian whose profile places her at risk of return to China. The panel finds on the totality of the evidence, that the claimant failed to establish credible and trustworthy evidence that she is or ever was a genuine Christian, and concludes therefore that she is of no interest to the authorities should she return to China.

Applicant's Knowledge of Christian Beliefs

[19] The Board stated that the applicant said that she was baptised in April 2001, that she had a Bible in China, that she read most of the Old and New Testament and that she joined the Logos Baptist Church in Markham in 2005. The Board stated that the applicant knew the correct number of disciples of Jesus, twelve, but could only name eight, that she did not know what a parable was but that she knew and told correctly the story of the shepherd and the lost sheep. The Board concluded the applicant's knowledge of the Bible and the Christian religion was peripheral and not consistent with the applicant's alleged six years as a Christian in China and in Canada. However, as the following excerpt demonstrates, the certified transcript of the Board hearing does not support the Board's conclusion:

Member: And what is your favourite parabola?

Claimant: I beg your pardon?

Member: What is your favourite parabola?

BY COUNSEL TO CLAIMANT:

Q. Do you understand what a parabola is?

Member: There are parabolos in the Bible. Have you read about them?

Claimant: Yes.

BY COUNSEL TO CLAIMANT:

Q. Tell us one.

A. He told me to obey the Commandments.

Q. I'm sorry.

A. To obey the commandments.

Member: Well, what parabola is that? Can you tell me where it's located? I don't know that you understand the question.

BY COUNSEL TO CLAIMANT

Q. Do you understand?

A. I'm so confused. May I write it down in Chinese? I have not learned that.

Member: Okay. The shepherd and the lost sheep would be a parabola. Do you know what the message is from that story? Do you know the story, first of all?

Claimant: That a shepherd has 100 sheep and one lamb got lost, and the Sheppard tried his hardest to find the lost lamb. That means God prefers that 99 lambs be his children, but he would feel very sad losing one.

Member: And what would he do when he finds the one? This is the last part of it that I wanted to ask. What happens when he finds the other one? What happens?

Claimant: Even if I had 99 lambs, I will not abandon that lost lamb.

[20] A parabola is a mathematical curve and not a Biblical story. At the hearing for judicial review, counsel for the respondent was asked about the word "parabola" in the transcript since the respondent argues that the applicant had to be prompted to answer what a parable was. She suggested it was a transcription error but offered no evidence that the word actually used in the

hearing was “parable”. On the basis of the certified transcript, the applicant cannot be faulted for the confusion. Even if the transcript is incorrect and the word “parable” was used, the applicant, who it must be remembered was participating through a Cantonese interpreter, readily displayed knowledge of the parable of the shepherd and the lost sheep.

[21] The Board’s conclusion that the applicant’s knowledge of the Bible and the Christian religion is peripheral on so little negative evidence cannot be sustained.

The Patriotic Church

[22] The Board reviewed the applicant’s responses about the state-approved Patriotic church but makes no adverse finding against the applicant on the basis of her answers on that topic.

Applicant’s Failure to inform her Husband about the Underground Church

[23] The Board makes two specific findings of implausibility. First, the Board finds it implausible that the applicant did not tell her husband that she was a member of the underground church until seven months after they were married and that she only told him after he questioned her about why she closed her fruit stand every Sunday. The Board further finds it implausible that the applicant, despite her husband’s fears and objections, chose to be baptised and continue regularly attending the underground church.

[24] In *Dong v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No 413 at para. 3, Justice Campbell stated:

The standard the RPD is required to meet in making implausibility findings is stated in *Vodics v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1000 as follows:

- para. 10 With respect to making negative credibility findings in general, and implausibility findings in particular, Justice Muldoon in *Valtchev v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1131, states the standard to be followed:
 - 6. The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C. 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the Maldonado principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions.
 - 7. A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]

[25] The applicant gave a coherent account of how her husband came to learn of her church attendance. She said she chose to become baptised and continue attending the underground church because of her religious belief, notwithstanding her husband's concern, because she loved her church and her God. She said her husband cared for her and had to accept her insistence on continuing to attend church. That a believer would persist in professing her faith in the face of

adversity is not surprising. This explanation is not one where the facts are outside the realm of what could reasonably be expected especially having regard to the nature of religious belief and the history of Christianity

[26] The Board offers three reasons for its finding of implausibility: an inconsistency between the applicant's beliefs and concealment of her church going from her husband, the failure to mention the concealment from her husband in her PIF narrative, and the absence of corroborative documents to corroborate her faith in Christianity and her membership in the underground church. The Board stated in its reasons at page 7:

The claimant's evidence is that as a Christian she understood the ten commandments, yet she allegedly withheld information on her underground religion during an extended period in which she met and then married her husband thus breaking the commandment, 'thou shalt not lie.' Further, there is no evidence from the claimant that she considered discussing this significant dilemma with her God, her pastor, or her alleged friend who introduced her to the underground church. Further, her PIF narrative does not state that she withheld such information from her husband, a non Christian, despite the fact that the Screening form makes it clear that significant details of incidents and events should be included. Further, there are no corroborative documents, such as a letter from her husband, or from her cousin, or from her pastor, to corroborate her Christianity and her membership in the underground church, in accordance with Rule 7, or the Refugee Protection Division Rules, referred to in the Screening Form. No reasonable explanation is before the panel as to why such corroborative information was not disclosed, or what steps, if any were taken to obtain such documentation.

[27] Leaving aside the observation that silence, strictly speaking, is not a lie, it must be noted that the Board did not ask the applicant to explain why she broke the commandment "thou shalt not lie." If this was an important factor in the Board's assessment of the applicant's account, then the question should have been put to the applicant so she could respond (see Lorne

Waldman, *Immigration Law and Practice*, 2nd ed. looseleaf, Markham: LexisNexis Butterworths, 2007 at 8.86 (xvi) (“*Immigration Law and Practice*”). The applicant had explained that she had been cautioned by the cousin who introduced her to the underground church not to tell anyone about the church. The Board ignores this explanation and does not make its credibility finding on the totality of the evidence (*Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 442 (F.C.A.); see also *Immigration Law and Practice*, above, at 8.86(iv)).

[28] The Board makes much of the applicant’s failure to mention her concealment of churchgoing from her husband in her PIF narrative. The applicant does refer to her attending the underground church, her marriage, and her husband’s subsequent concern in her PIF narrative. The details of how her husband found out are precisely the kind of information that emerges in the fullness of an immigration hearing where an immigration official has the opportunity to question the applicant. The failure to mention this level of detail in the PIF narrative is not a particularly significant element upon which to assess credibility.

Corroboration

[29] The Board also based its adverse finding on credibility on the absence of corroborating documents about the applicant’s faith in Christianity or membership in the underground church in China from her husband, cousin or pastor. The Board noted that no reasonable explanation was before it why such corroborative information was not disclosed, or what steps were taken to obtain such documentation. The Board did ask the applicant why the Canadian pastor’s letter of support,

while mentioning the applicant's flight because of the impending birth of her second child, does not mention that the applicant's participation in the underground church in China, something one would expect to be of significance to a Christian pastor. However, the Board did not go beyond this focussed line of questioning and ask the applicant for an explanation for the absence of other corroborative documents. A Board will err in finding an applicant not credible because he or she is not able to provide documentary evidence corroborating his or her claim. The applicant's failure to provide corroborating evidence of her membership in the underground church, while a correct finding of fact, cannot be related to the applicant's credibility, in the absence of evidence to contradict the allegation (*Ahortor v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 705 at para. 45). The Board erred in concluding that the absence of corroborative documents enables the Board to make an adverse inference against credibility without giving the applicant an opportunity to provide an explanation is an error.

The use of an Interpreter and Language

[30] The Board refers to the applicant's confusion when asked if her Canadian pastor referred to her as 'reborn'. The applicant initially responded 'yes', adding that he, the Pastor, knew she had a baby. The Board considered this a confusing response. When the applicant's attention was directed to the pastor's letter, she responded correctly that she had been baptized and therefore reborn. Reliance on this type of confusion to draw conclusions is the kind that the Federal Court has cautioned against when an applicant is testifying through an interpreter as is the case here. (*Attakora v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 444 (F.C.A.); and *Owusu-Ansah*, above).

Irrelevant Considerations

[31] The Board makes specific note of an absence of credible evidence before it “as to the religious status of the Canadian born daughter.” In the absence of any evidence of a religious practice of baptizing infants shortly after birth, the religious status of the applicant’s seven month old baby girl is clearly irrelevant. A Board cannot base credibility findings on irrelevant considerations (*Attakora*, above; and *Owusu-Ansah*, above).

Failure to Consider Evidence

[32] The Board’s conclusion, at page 9 of its reasons, on the issue of the applicant being a Christian is as follows:

Based on the totality of the evidence, the panel finds the claimant failed to demonstrate in credible and trustworthy evidence, and on a balance of probabilities, that she was a member of an underground church in China, or that she is a genuine Christian. The panel concludes that she joined the Logos Baptist Church, Markham, as a means of bolstering her refugee claim. The Panel concludes that there is no persuasive evidence that she would pursue the Christian religion in China, either through the registered Patriotic church, or the non-registered underground church house, and therefore that her claim to refugee protection on the grounds of religion is not well-founded.

[33] In addition to disregarding the applicant’s own testimony about her involvement in the underground church and her professions of religious belief, the Board completely ignores the letter of the Canadian pastor who states that the applicant has attended the church’s Sunday service since September 2005, which is a month after she first arrived in Canada. The pastor states that she is a re-born Christian and has participated enthusiastically in their church. The alacrity in which the applicant took up attending and participating in Christian services is consistent with her testimony that she became a Christian in China. The letter from the Christian

pastor who has had an opportunity to observe the applicant's participation in Christian services and who expresses the opinion that the applicant is a Christian is evidence that the Board must take into account. The Board offers no basis for disregarding this evidence.

Absence of Evidence

[34] Finally, nowhere is there any evidence, cited by the Board or contained in the transcript of the Board hearing, supporting its conclusion that the applicant joined the Logos Baptist Church solely as a means of advancing her refugee claim.

Conclusion on the First Issue

[35] I find the Board's reasons for finding that the applicant was not credible and concluding that she had not been a member of the underground church nor was a Christian to be patently unreasonable.

Board's finding that the Applicant did not face persecution on any Convention Ground or was a person in need of protection

[36] The Board relied primarily on documentary evidence to conclude that the applicant's fears of forced abortion and sterilization were not objectively well-founded. However, the Board necessarily referred to the applicant's evidence and testimony. The Board stated at page 10 of its reasons:

The determinative issue in the claim is whether the claimant demonstrated in credible and trustworthy evidence that she is in violation of China's one-child family policy and risks persecution if she were to return to her country of citizenship.

[37] The Board had first addressed the question of the applicant's Christian beliefs both at the hearing and in its written reasons. The Board had ruled that the applicant was not credible, a decision that I have found to be patently unreasonable.

[38] Given the Board's erroneous finding on the applicant's credibility, I do not consider it possible for the Board to have properly considered the applicant's testimony and evidence in respect of her claim for refugee status on Convention grounds or on section 97 grounds. Accordingly, I need not examine the Board's decision on this second issue as it rests on a patently unreasonable assessment of evidence.

Conclusion

[39] I find the Board's decision on credibility to be patently unreasonable.

[40] The decision of the Board dated September 18, 2006, will be quashed and the matter referred to a differently constituted Refugee Protection Division board for re-determination.

Certification

[41] Neither party has suggested a question for certification and I find none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination;
2. No serious question of general importance is certified.

“Leonard S. Mandamin”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-5468-06

STYLE OF CAUSE: PIN XIAN XIN (PINXIAN XIN)
v.
THE MINISTER OF
CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 2, 2007

**AMENDED REASONS FOR JUDGMENT
AND JUDGMENT:** Mandamin J.

DATED: January 7, 2008

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