Date: 20080417

Docket: IMM-3387-07

Citation: 2008 FC 501

Ottawa, Ontario, April 17, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

C.D.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks the judicial review of a Pre-Removal Risk Assessment (PRRA) decision dated July 10, 2007, where in the PRRA officer found that he was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). This application for judicial review is dismissed for the reasons which follow.

I. Facts

[2] The applicant is a 63 year old citizen of China. He claims to fear persecution at the hands of the Chinese authorities for his practice of Falun Gong, and also that he is afraid of a Public Security Bureau (PSB) officer who had an affair with his wife.

[3] In 1994, the applicant discovered that his wife was having an affair with a local government official. When he caught them together in his house, a violent confrontation occurred and the applicant was beaten and tied up for two to three days. He then complained to the police but nothing was done as the local authorities refused to act and the central authorities considered the matter to be local.

[4] Although his wife's affair with the PSB officer ended, the applicant said that the harassment continued. In 1995, the applicant was allegedly framed by the PSB officer. He was arrested and detained for 15 days on charges of stealing a bicycle. After his release, he had to report weekly to the authorities.

[5] As a result of this harassment, the applicant left his hometown and went into hiding in Tientsin and later, in Guangzhou. However, a year and a half later, the authorities discovered his location and returned him to his hometown where the PSB officer started again to harass the applicant.

[6] In 1998, the applicant began to practice Falun Gong, before the movement was banned by the Chinese government. Shortly thereafter the authorities began to crack down on Falun Gong; the applicant became afraid of persecution even though Falun Gong was not banned by the government until after he left China in 1999.

[7] In January 1999, he fled to Canada and applied for refugee protection a year later. He left China supposedly for the purpose of a business trip in Canada. His claim, based on his fear of persecution as a Falun Gong member and as a target of a PSB officer, was rejected by the Convention Refugee Determination Division (CRDD) on January 16, 2001, mainly on credibility concerns.

[8] The applicant applied for a Post-Determination Refugee Claimants in Canada assessment; his application was converted to a PRRA upon the implementation of the *IRPA* in June 2002. He also asked for permanent residence based on humanitarian and compassionate grounds (H&C).

[9] On September 16, 2005, the applicant alleged that he participated in a protest against the Chinese President Hu Jintao where Chinese spies took photographs of him.

[10] On July 10, 2007, both his PRRA and H&C applications were rejected and the applicant filed an application for judicial review before the Federal Court regarding the negative conclusion on the PRRA.

II. Impugned decision

[11] The PRRA officer concluded that there was no more than a mere possibility of the applicant being targeted by the PSB officer in the event of a return to China. He could not see why the PSB officer would still have an interest in harassing the applicant. In the last nine years, the applicant had not received any communication from the PSB officer, who thus does not appear to have a continued interest in him.

[12] The PRRA officer noted that ten years have elapsed since the bicycle incident and the authorities do not seem to have any interest in the applicant anymore. The PRRA officer pointed to the fact that the applicant had not provided any proof that he had been sought by the authorities after he left the country. In any event, he concluded that the applicant's punishment, after his detention for 15 days, was to report weekly which does not amount to persecution.

[13] While the PRRA officer acknowledged that Falun Gong practitioners were persecuted by the Chinese government, he did not believe that spies could have identified the applicant as a practitioner. He could not agree with the applicant that Chinese spies are interested in Falun Gong members since documentary evidence shows that they mainly focus on industrial espionage. The PRRA officer found that it was highly speculative as the applicant never proved that he has been followed, pursued or harassed by Chinese spies in Canada.

[14] Except for the applicant's written submissions describing his activism in Canada related to Falun Gong, the PRRA officer noted that there were few documents to corroborate the applicant's involvement in Falun Gong.

[15] Regarding the applicant's participation in the protest against the Chinese President, the PRRA officer found speculative, as based on hearsay, the fact that Chinese spies would have taken a photograph of him. Even if a picture was actually taken, he concluded the applicant did not prove that his identity or his relationship to Falun Gong was known by the Chinese authorities.

[16] The PRRA officer noted that the applicant only provided evidence of activism with Falun Gong in May 2006. Little or no probative value was given to this evidence: some documents were not translated; one was an anonymously published, general, unnamed and undated "pamphlet"; the photos listed were not actually provided; and the cheque was irrelevant. The PRRA officer also gave little weight to a letter written by Sue Zhang, whose identity and role is uncorroborated, as it was handwritten without a letterhead and has no security features. In any event, he found that the letter merely corroborated the applicant's participation in the protest against the Chinese President without any reference to possible danger as a result of his identification by the Chinese government.

[17] The PRRA officer concluded that the applicant is not a Falun Gong practitioner with a profile that would bring him to the attention of the Chinese authorities; he practices Falun Gong publicly in Canada by distributing pamphlets and by participating to the September 2005 protest, but the Chinese authorities is not aware of his involvement.

[18] Furthermore, the PRRA officer noted that the applicant, practicing Falun Gong only for health benefits without any political belief, would not be unable or unwilling to practice privately in China. Therefore, his level of involvement would not bring him to the attention of the Chinese authorities if he were to return to China.

[19] The PRRA officer considered that the applicant's contention regarding his fear of persecution based on his illegal departure from China and his refugee claim in Canada was not supported by the documentary evidence. As the applicant had travelled on a valid Chinese passport and had not taken any improper measures when he proceeded to exit control at the Chinese airport, the PRRA officer found this fear unjustified. Furthermore, he noted that few documents report punishment of returned migrants. It happens notably when the migrant does not have the required documents to leave and the punishment only amounts to relatively small fines and/or a few days of detention. The PRRA officer did not consider that the applicant's exit from the country and his subsequent refugee claim would lead to a serious possibility of harm.

[20] As the applicant did not provide the PRRA officer with psychological evidence, he concluded that it was speculative to contend that the applicant's return to China would cause him psychological and/or emotional damage. The applicant's unwillingness to return in his country does not fall within the definitions of sections 96 and 97 of the *IRPA*. The PRRA officer believed that the applicant's subjective fear was not objectively well-founded.

III. Issues

[21] The applicant contends that the PRRA officer erred in the assessment of his application and that he failed to properly analyse the risk. He believes that he was entitled to an oral hearing and thus, that the PRRA officer breached the requirements of procedural fairness in refusing to allow him an interview. Finally, the applicant submits that the Court should consider extrinsic evidence that was not before the PRRA officer when he rendered his negative decision.

IV. Analysis

1) What is the appropriate standard of review?

[22] A PRRA officer's decision considered globally and as a whole is generally assessed on a standard of reasonableness *simpliciter* as determined in *Figurado v. Canada (Solicitor General)*, 2005 FC 713. The Court has also concluded that each particular finding must be reviewed to determine whether it raises questions of fact, of mixed fact and law or of law: see *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437. The parties agreed at the hearing on the application of the reasonableness *simpliciter* standard.

[23] After the hearing but before these reasons were issued, the Supreme Court handed down its decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9. As a result of that decision, the previous reasonableness standards have been merged into one. In doing so, the Supreme Court held that "deference requires respect for the legislative choices to leave some matters in the hands of

administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (at para. 49). Consequently, the Court will only intervene to review the PRRA officer's decision where the decision would not fall within the possible and acceptable conclusions defensible on the facts and law (at para. 47).

[24] The *Dunsmuir* decision does not have an impact on questions of procedural fairness. In *Demirovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, Justice Eleanor R. Dawson determined that the standard of review with respect to section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*) is correctness. I agree with her assessment, and would therefore apply this standard for the matters relating to the oral hearing.

2) Did the PRRA officer fail to properly assess the risk?

[25] The applicant criticizes the PRRA officer for the fact that he based his decision mainly on the CRDD decision. Therefore, he believes that the PRRA officer failed to properly assess the risk.

[26] The purpose of the PRRA is to give failed refugee claimants a process which assesses whether country conditions or/and personal circumstances have changed since the issuance of the refugee decision: see *Cupid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 176 [*Cupid*] at para. 4. When an applicant fails to prove such a change, the PRRA officer is entitled to rely on an unchallenged decision of the Refugee Board: see *Cupid*, above at para. 21.

[27] In the case at bar, I do not believe that the PRRA officer erred in relying on the CRDD decision. The CRDD rejected the applicant's asylum request, basing itself mainly on credibility concerns. It concluded that there was insufficient credible evidence "to show there was more than a mere possibility that he would be persecuted by a vengeful official or anyone else for practicing Falun Gong. Even if he is a practitioner of Falun Gong, should he practice in private, as he claims to be doing in Canada, he should not face difficulties".

[28] The applicant submitted written representations in 2001, 2002, 2005, 2006 and 2007. The applicant's reasons to apply for a PRRA are essentially the same as his reasons for seeking refugee protection: he would be persecuted by a PSB official and by the Chinese authorities as he is a Falun Gong practitioner. However, in his 2005 submissions, he focused on his involvement in a protest against the Chinese President where spies allegedly took pictures of him; he did not provide any additional documentary corroboration. Then in his 2006 representations, the applicant provided documentation stating that he had become an active practitioner: pages referred as "study material", a pamphlet, photos, a letter signed by Sue Zhang and a cheque.

[29] The applicant contends that Ms. Sue Zhang's letter confirmed his participation in the protest and thus, the PRRA officer erred when he stated that there was no corroborating evidence regarding his participation in Falun Gong. The PRRA officer concluded the following regarding this letter:

> More specific to the applicant are a letter signed by a Sue Zhang and a cheque made out from the applicant to a Xiao Weng Shang. However, I give these two documents very little weight. The letter is handwritten, has no security features or letterhead, and its author's identity and role in the Falun Gong movement are uncorroborated (though I note a person of the same name quoted in the "pamphlet").

> More importantly, the letter says very little about the applicant: only that he "participated" (it doesn't describe how) in the anti-Hu protest, and that his participation and support are appreciated. The letter does not confirm the applicant as Falun Gong practitioner or that he has been involved in any other way with Falun Gong in Canada. More importantly, it does not mention problems at the demonstration such as surveillance or interference, or indicate any concern that the applicant would have been identified as a Falun Gong practitioner or would be in danger in any way. Therefore, I find that the letter does very little to indicate that the applicant would be at risk in China.

[30] The letter effectively does not prove anything except that the applicant did participate in the protest against the Chinese President. In any event, I believe that the PRRA officer accepted that the applicant participated in the protest but he did not believe that he had a profile that would bring him to the attention of the Chinese authorities. He also concluded that, even if he was practicing publicly in Canada, the Chinese authorities do not know his identity. Therefore, I do not think that the PRRA officer disregarded Sue Zhang's letter.

[31] In the applicant's view, the PRRA officer applied a "beyond a reasonable doubt" standard of proof. I do not agree with the applicant; I believe that the PRRA officer applied the correct standard when he required proof on a balance of probabilities.

[32] The PRRA officer concluded that the evidence does not indicate that spies are effectively targeting Falun Gong practitioners. The applicant argues that independent documentary evidence supports the fact that he has been photographed by Chinese spies. In his reasons, the PRRA officer held the following:

> The applicant's counsel in September 2005 and May 2006 made written submissions arguing that Chinese spies report on Falun Gong

> practitioners in Canada, arguing that this puts the applicant at risk. For corroboration, counsel refers to news reports that were not provided for my consideration – as well as quoting from a "pamphlet" to which, for reasons described below, I do not assign much weight. I acknowledge independent, objective news reports about Chinese spies in Canada (such as in those listed in section 9 below). That such spies target the Falun Gong movement in Canada is an allegation from Chinese defectors whose statements have not been officially corroborated and are potentially self-serving for their own asylum bids; a Canadian source quoted indicates that the spies' efforts focus rather on industrial espionage. Specifically, any focus of such spies on learning the identities of Falun Gong practitioners is not well-supported in the evidence I have examined, and, with respect to any risk to this individual applicant, is highly speculative. The applicant's evidence does not indicate that he has personally been followed, pursued or harassed by Chinese agents in Canada.

[33] The CTV news report, "Chinese spies cost Canada billions: Harper", and the CBC news report, "Defectors say Chinese running 1 000 spies in Canada", are effectively based on Chinese defectors' allegations that were not corroborated by any objective evidence. The only corroboration has come from a former Canadian Security Intelligence Service (CSIS) agent who confirmed that there is Chinese industrial espionage. He said that the spies were not Chinese trained spies but paid informants. The former CSIS agent then stated that there was "evidence to prove that Chinese intelligence agents use illegal methods to spy on and disrupt the Falun Gong" (see CBC news report). Notwithstanding these submissions, the evidence referred to by the former CSIS agent has not been produced by the applicant and there is no objective evidence whatsoever confirming his submissions on this matter. Therefore, I do not believe that it was unreasonable to conclude that these reports are not reliable evidence.

[34] Regarding the applicant's allegation that someone took his picture at a protest, the PRRA officer concluded that it was speculative hearsay. I agree with this finding as it is only submitted in the applicant's PRRA representations where he stated that someone told him that a woman took photos of him. The person who informed him of this never corroborated the allegation and therefore, the conclusion drawn by the PRRA officer was open to him.

[35] In his reasons the PRRA officer also held that "even if it was Chinese agents who took his picture, the applicant has not provided evidence that would indicate on a balance of probability, that his identity as a Falun Gong practitioner or supporter is known to Chinese authorities". The applicant asserts that, in light of current security issues in China and the fact that most buildings have security cameras, it would be naïve to think that Chinese authorities can not identify him. Here again, there is no objective evidence to corroborate this assertion or to prove that Chinese authorities are interested in him. Consequently, I agree with the PRRA officer's findings on this matter.

3) Was the applicant entitled to an oral hearing?

[36] Section 167 of the *IRPR* sets out the factors to be taken into consideration in order to determine whether an applicant is entitled to an oral hearing:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la

and 97 of the Act;	crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection

[37] The applicant believes he was entitled to an oral hearing as the outcome of the PRRA is critically important to him. The respondent argues that the applicant did not demonstrate that his evidence raised a serious issue regarding credibility.

[38] The refusal of the PRRA is of considerable importance for the applicant; however, the absence of a hearing does not automatically amount to a violation of fundamental justice: see *Younis v. Canada (Solicitor General),* 2004 FC 266.

[39] I agree with the respondent as I cannot find any credibility concerns on the part of the PRRA officer. The applicant was given the chance to submit written representations and evidence; the PRRA officer found that there was insufficient evidence to establish on a balance of probability that the applicant would be at risk in China. I do not think that the PRRA officer breached procedural fairness when he did not provide the applicant with an oral hearing.

4) Should the Court consider extrinsic evidence that was not before the PRRA officer?

[40] The applicant believes that the Court should consider his Exhibit E (a document that he allegedly gave to the immigration officer and the Chinese official during an interview) in its assessment. He contends that it shows Chinese authorities are aware of his activities. However, this exhibit was not before the PRRA officer when he assessed the applicant's request.

[41] If an applicant believes that the evidence not submitted to the original decision-maker nevertheless needs to be considered by the Court, he has to demonstrate that the evidence is needed to resolve issues of procedural fairness or jurisdiction or that there are very exceptional circumstances to justify an exception to the general principle: see *Omar v. Canada (Solicitor General)*, 2004 FC 1740 [*Omar*]. In *Alabadleh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 716, Justice Mosley found that the decision *Omar* was not "intended to expand the category of exceptions to the general principle that fresh evidence is not admissible on judicial review" even if he admitted that "there may be circumstances in which the interests of justice require that evidence that was not before the decision-maker be admitted and considered".

[42] The applicant relies on *Omar* to submit that his case presents exceptional circumstances as he asserts that the new evidence shows that Chinese authorities are aware of his activities with Falun Gong in Canada and that he had made a refugee claim, which would likely lead to his persecution if he were to return to his country. I believe that the decision *Omar* has to be distinguished from the present case; the Court in *Omar* admitted new evidence, exhibits supported by affidavits, establishing that Mr. Omar would be persecuted and at risk in the event of a return in China.

[43] Here, the applicant includes only a piece of paper containing Chinese characters with an uncertified translation in English. The document is also undated and self-serving. The respondent submits that the document by itself is insufficient evidence that the Chinese government is aware of the applicant's implication with Falun Gong or that he faces a new risk of persecution. Furthermore, the respondent argues that there is no evidence that the Chinese government had contacted the applicant in Canada or had taken any interest in him. I agree with the respondent and I do not think that there are exceptional circumstances justifying an exception to the general principle of exclusion.

[44] For these reasons I would therefore dismiss this application for judicial review.

[45] The PRRA officer concluded that the Chinese authorities are not aware of the applicant's involvement with Falun Gong. To prevent a risk for the applicant when he returned, I suggested an amendment to the style of cause to the parties. When the respondent took no position on the subject, the applicant fully endorsed the idea. Therefore, I believe that the applicant's name should be deleted from the style of cause out of caution.

[46] The applicant proposed the following question for certification:

> In circumstances where a PRRA decision has been rendered and an immigration officer knows that an applicant has confirmed his activities with the authorities, when there are credible reports that persecution and torture prevails in the country where the applicant is to be removed, is there a duty on the immigration officer to refer the matter back to the PRRA

> officer for re-assessment taking in account the new evidence / circumstances? If so, under what circumstances?

[47] I do not believe that this is a serious question of general importance which would be dispositive of an appeal and, as a consequence, I will not certify the applicant's proposed question.

JUDGMENT

THIS COURT ORDERS that

1. the application for judicial review is rejected.

2. the name of the applicant is deleted from the style of cause and replaced with the initials C.D.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3387-07
STYLE OF CAUSE:	C.D. **v.** MCI
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	February 19, 2008
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