

Date: 20081010

Docket: IMM-586-08

Citation: 2008 FC 1146

OTTAWA, Ontario, October 10, 2008

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

JING TAO SHEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, under to section 72(1) of the *Immigration and Refugee Protection Act*, of the decision of M. Israel, Member of the Refugee Protection Division of the Immigration and Refugee Board (“the Board”), wherein the Board determined that the Applicant is neither a Convention Refugee nor a person in need of protection. The decision under review is dated January 15, 2008.

[2] The Applicant, Jing Tao Shen, is a citizen of the People’s Republic of China. On October 27, 2003 a good friend of the Applicant, Li Ming, arrived unexpectedly at the Applicant’s rented apartment at about 10 p.m. He told the Applicant that he was being sought by the Public

Security Bureau (“PSB”) because he was a Falun Gong practitioner. The Applicant agreed to allow him to stay in his home for a few days, because he was a good friend who had assisted him in the past. The Applicant told him to remain inside the apartment, and not to go onto the balcony. According to his testimony before the Board, the Applicant, who worked at a restaurant, would bring food for his friend every evening when he returned to the apartment.

[3] On October 30, 2003, when the Applicant returned home from work around 10 p.m., Mr. Li had already left the apartment. The following day, around midday, the Applicant returned to work, and was told by his boss that PSB officers had been to the restaurant to look for him. Fearful, the Applicant left his workplace and went into hiding at the home of a friend. The PSB officers also went to the Applicant’s parents’ home; the record is unclear, however, as to whether this occurred before or after he fled to his friend’s home. The Applicant learned from his parents that Mr. Li had been arrested and that the PSB were looking for him because he had harboured a Falun Gong member.

[4] On November 7 or 8, 2003, the Applicant, accompanied by a friend, met with Mr. Wang Fa Chen, a smuggler, to obtain travel documents. He paid Mr. Wang 100,000 RMB, approximately 60,000 of which was borrowed from the Applicant’s parents and a friend. The Applicant arrived in Canada on December 23, 2003. After coming to Canada, the Applicant claims to have learned that the PSB were still looking for him and that Mr. Li remained in detention.

[5] The Board determined that the Applicant was neither a Convention refugee nor a person in need of protection, finding that his claim lacked plausibility and credibility. This decision was based on several findings. In sum:

- a. The Board found it neither plausible nor credible that the Applicant's landlord and family members did not become aware of or investigate the presence of the Applicant's friend in his second-floor apartment.
- b. The Board drew a negative inference from the claimant's changing reasons regarding the nature of the risk of harbouring a Falun Gong member.
- c. The Board did not find it either credible or plausible that the PSB was able to locate the Applicant's friend so quickly, concluding that it was "more likely than not that Guangzhou city PSB agents would not have been able to do so at night and in the dark."
- d. The Board found improbable the Applicant's attempt to explain at the hearing why PSB agents went to his parents' home rather than to his current residence, where his friend had allegedly stayed, to find him.
- e. The Board drew a negative inference from inconsistencies in the Applicant's testimony about when his parents became aware of the reason for his pursuit.
- f. The Board found the Applicant's "lack of interest in checking on the situation in his landlord's home, either regarding his own jeopardy or that of the landlord, is neither credible nor plausible."
- g. The Board drew a negative inference from the Applicant's failure to mention in his Personal Information Form ("PIF") that his father had allegedly been deprived of his employment because his son had harboured a Falun Gong practitioner.
- h. The Board drew a negative inference from the Applicant's inconsistent statements about the colour of the passport provided to him by the smuggler and his lack of knowledge about whether the document included his name and photograph.

[6] The Applicant argues that the Board made numerous errors in its assessment of the Applicant's credibility, which merit the intervention of this Court.

[7] The Applicant's main contention is that the Board's findings on credibility are generally conjectural, and unsupported by evidence. The Applicant also accuses the Board of engaging in "microscopic analysis" of the Applicant's testimony, and misconstruing some of his statements.

[8] With regard to the Board's negative inference about the Applicant's failure to mention in his PIF that his father had allegedly lost his job, the Applicant argues that the information is not sufficiently material to warrant a negative inference about his credibility; his father's experience was not determinative of the Applicant's decision to flee China. The Applicant also contests the negative inference drawn by the Board in relation to the Applicant's testimony about the passport he used to travel to Canada, arguing that his statements were consistent regarding the fact that he traveled with a Canadian passport. Any wavering about its colour was not a proper basis for finding him not credible.

[9] On this basis, the Applicant asks that the decision of the Board be set aside and the matter referred back to the Refugee Division for re-determination before a differently constituted Panel of the Board.

[10] The Respondent argues that the Board's position was reasonably open to it and that the Applicant failed to raise an arguable issue. The Board provided numerous reasons why it doubted the truthfulness of Applicant's evidence and no single factor was determinative. According to the Respondent, these reasons should be read as a whole.

[11] The Respondent seeks to have the application for judicial review dismissed.

[12] Issues of credibility are treated as issues of fact. Consequently, they are reviewed on a standard of reasonableness and will not be disturbed unless based on an erroneous finding of fact that is made in a perverse or capricious manner, or without regard to the evidence (section 18.1(4)(d), *Federal Courts Act*, R.S.C. 1985, c.F-7; *Dunsmuir v. New*, [2008] S.C.J. No.9, 2008 SCC 9).

[13] The Applicant, in his submissions, enumerates six issues warranting this Court's intervention, each of which contests the Board's findings regarding the Applicant's credibility. While I agree that some of the Board's reasons, taken individually, may be defective, they are not, in my view, capricious or perverse.

[14] In *Aguebor v. M.E.I.*, (1993), 160 N.R. 315 (F.C.A.), at para. 4, the Federal Court of Appeal noted:

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.

[15] The burden of proving a claim for refugee protection lies with the Applicant and the standard of proof regarding the factual elements of the claims is a balance of probabilities. Although extensive documentation was provided regarding the persecution of Falun Gong practitioners and their supporters in China, generally, the Applicant was unable to adduce any specific evidence to corroborate his narrative.

[16] Some of the Board's findings are questionable. First, the Board doubted the Applicant's credibility because it found it very unlikely that that the Applicant's landlord or his family members would not have recognized that someone was in the apartment while the Applicant was away at work. As the Applicant points out in his submissions, it is not implausible that the landlord and his family remained unaware of Mr. Li's presence in the apartment; there was a separate entrance to the apartment and the Applicant had explicitly warned his guest not to make any noise and to remain in the apartment. Moreover, even if they suspected someone's presence in the rented apartment, there is no reason to assume they would have found anything amiss or seen any reason to investigate. However, in the absence of any corroborating evidence, either from the landlord or others who may have been aware of the friend's visit – such as the Applicant's boss, co-workers or friends – I cannot conclude that the finding was unreasonable.

[17] Second, the Board found the Applicant's narrative regarding the question of risk implausible. This seems to have been based on some ambiguity in the exchange between the Board

member and the Applicant during the hearing about the nature of the “risk” being discussed. The exchange is summarized at page 2 of the Board’s Reasons:

The claimant was asked if he knew Falun Gong was banned. He said ‘yes’. He was asked if he was aware that someone who helped a Falun Gong practitioner might be in jeopardy of arrest. He said ‘yes’ but that it was his understanding there would be no problem if he helped only two or three days. It was noted that it made no apparent difference to the police if he had helped one day or ten days. The claimant then said that his apartment was in a quiet place and seldom visited by the PSB, therefore, he thought there was no problem. He was reminded that he had testified that he was aware of the risk. He said ‘yes’ I draw a negative inference from the claimant’s changing reasons regarding the nature of the risk.

[18] The Applicant offers a different assessment of the apparent inconsistency: the Applicant’s statement that he believed there was no problem if his friend stayed at his apartment for a few days is not inconsistent with the Applicant’s testimony that he was aware of the risk for someone who assists a Falun Gong member, in the *event of* discovery (Applicant’s Memorandum, para. 26, 27). The Applicant therefore distinguishes between the risk of discovery and the risk faced by those who are discovered, and suggests that this distinction explains the Applicant’s supposed self-contradiction. Once again, I am inclined to agree with the Applicant that the Board’s reasoning is problematic, finding a lack of credibility where there may have been mere misunderstanding. I note, however, that the Applicant and his counsel had an opportunity at the time of the hearing to correct this misperception.

[19] The Board, in its Reasons, then doubted the Applicant's credibility because of his failure to provide an explanation for how quickly government agents appear to have apprehended his friend. The facts suggest that Mr. Li left the Applicant's apartment sometime on October 30, 2003; by the next morning, the PSB had allegedly gone to the Applicant's place of work in search of him.

[20] The finding of the Board that "more likely than not ... Guangzhou city PSB agents" would have been unable to locate Mr. Li "at night and in the dark" is not explicitly based on the evidence; it is an attempt to understand what took place in the absence of any explanation provided by the Applicant. The Applicant, however, is in no position to explain the conduct of the authorities and his inability to explain their behaviour should not be held against him (*Cao v. Canada (M.C.I.)*, IMM-4171-06, August 7, 2007 (T.D.)). Nevertheless, this finding, while problematic, is not dispositive; it clearly was one of several factors that weighed in favour of the Board's finding of implausibility.

[21] The Applicant, for instance, was plainly inconsistent in his account of when his parents' became aware of his pursuit by the PSB. He also was unable to provide a reason why his friend would provide his parents' address, rather than his current address, to the PSB. Two further issues provided a basis for negative inferences by the Board about the Applicant's credibility: (1) his failure to make any mention in his PIF that his father had allegedly been stripped of his livelihood by the government because his son had harboured a member of Falun Gong; and (2) his inability to recall details of the Canadian passport he had used to travel to Canada from China.

[22] Once again, neither of these factors, on their own, would normally be a sufficient basis to infer a lack of credibility. With respect to omissions from the PIF, for instance, oral testimony is generally allowed to provide additional details of a claimant's narrative and should not be a basis for impugning credibility (*Selvakumaran v. Canada* (M.C.I.), IMM-5103-01, May 31, 2002 (F.C.T.D.), at para. 21). However, taken together with the other considerations that clearly raised doubts in the mind of the Board, they are sufficient to ground the result.

[23] The Board's reasoning nowhere rose to the level of capricious or perverse, although in some instances it may have been questionable. In view of this and the marked absence of supportive evidence by the Applicant, the decision is not unreasonable and should therefore not be disturbed.

[24] Accordingly, the application for judicial review will be dismissed. No question of general importance was submitted for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

No question of general importance will be certified.

"Louis S. Tannenbaum"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT:** TANNENBAUM D.J.

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