

Federal Court



Cour fédérale

Date: 20090615

Docket: IMM-4909-08

Citation: 2009 FC 632

Ottawa, Ontario, June 15, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

CAI BING ZHONG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application exposes a fundamental fault in the refugee claim process applied at the time the Applicant made his initial statements claiming refugee protection.

[2] The initial interview was conducted through a Cantonese interpreter. The Applicant gave his statements in Cantonese which were in turn given in English by the interpreter and written in English by the interviewing officer. No independent means, such as a recording, was used to verify what was said by either the Applicant or the interpreter, or whether the interviewing officer's

writing accurately recorded what the Cantonese interpreter said. This “Record of Examination” is the center of a fundamental controversy in the present Application.

[3] Following the preparation of the Personal Information Form (PIF) by the Applicant with the help of legal counsel presently representing him in the present Application, the Record of Examination was made available to the Applicant and his counsel. As a result, the Applicant immediately asserted to his counsel that the Record of Examination does not correctly record what he said in the interview, and, as a result, counsel for the Applicant made this known to the Refugee Protection Division (RPD) well in advance of the hearing.

[4] Nevertheless, the RPD member who conducted the hearing chose to use the Record of Examination as accurate and relied on the statements made in it to find contradictions between it and the PIF and the oral evidence produced at the hearing. This process resulted in a negative credibility finding made against the Applicant. In my opinion, this process constitutes a breach of due process.

[5] In the absence of a verifiable record of what was said by the Applicant at his interview, I find it is a breach of due process for the RPD to have accepted the Record of Examination as accurate in the face of the Applicant’s sworn statement that it is not accurate. In my opinion, the Record of Examination is the result of a fundamentally flawed record keeping process and should not be used with respect to the Applicant’s claim for refugee protection.

[6] Given the breach of due process found, I find that the decision under review is made in reviewable error.

[7] On the basis of an argument that the finding of a breach of due process in the present case may have broad implications for the refugee claim process, Counsel for the Respondent advanced the following question for certification:

Is it a breach of natural justice for the Refugee Protection Division of the Immigration and Refugee Board to rely on a Record of Examination completed by an Immigration Officer in its assessment of the credibility of a refugee claim?

Counsel for the Applicant objects to the question being certified because the finding of breach of due process in the present case is based on the facts of the present case. I agree with this argument.

[8] In my opinion, the interview process used in the present case does expose a consequent refugee claim decision to a due process challenge, but the outcome of the challenge depends on the circumstances of the individual case. In the present case, advance notice was provided to the RPD of a sharp conflict between the statements in the Record of Proceedings and the Applicant's statements in the PIF. In this particular fact situation, I find it was unfair of the RPD to rely on the unverifiable conflict to make a negative credibility finding.

ORDER

Accordingly, I set aside the decision under review and refer the matter back to a differently constituted panel for redetermination on the direction that the Record of Examination not be used on the redetermination.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4909-08

STYLE OF CAUSE: CAI BING ZHONG v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 3, 2009

**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: JUNE 15, 2009

APPEARANCES:

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Nina Chandy FOR THE RESPONDENT

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