Federal Court  Cour fédérale

Date: 20091001

Docket: IMM-440-09

Citation: 2009 FC 978

OTTAWA, Ontario, October 1, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

GUANG YUAN HAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board of Canada / Refugee Protection Division ("the Board"). The Board found that the Applicant, Mr. Guang Yuan Han, was not a refugee or 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").

Factual background

[2] The Applicant is a citizen of the People's Republic of China. He is married and has two children. After the birth of his second child in 2005, the Applicant noticed that his wife seemed

changed; she was impatient and angry, and would frequently leave the family home. As a result, the Applicant and his wife quarrelled often.

[3] The Applicant told his friend, Yong Gang Li, about the strain on his marriage. Yong Gang Li offered the Applicant hope in the form of Christian teachings about God and Jesus Christ, and also explained the role prayer could play in his life. The Applicant began to pray every day for both himself and for his wife. He met with Yong Gang Li two more times over the next few months, and continued to pray daily. He noticed a change in his own ability to deal with his home situation, and also some positive changes in his wife. By the last Sunday of October 2005, Guang Yuan Han began to attend an underground house church.

[4] The church consisted of 10 members, including the Applicant. The church services took place in the homes of a few of the members. Two members acted as lookouts, and the Applicant was told of the escape routes should the church ever be raided. The members met for Bible study and prayer, and the service would end with an announcement of when and where the next service would take place. Occasionally a pastor would attend and perform baptisms and Holy Communion. The Applicant was baptized on the first Sunday in May 2006. Guang Yuan Han told a few trusted people about his newfound faith. In February 2006, he told his wife for the first time.

[5] On October 29, 2006, the Public Security Bureau ("PSB") raided the underground church the Applicant was attending. The Applicant escaped the raid on foot, and then took two separate taxis to a friend's house, where he went into hiding. A few days later, on November 1, 2006, the Applicant learned that three members, including the member who had been hosting the worship

service, had been apprehended by the PSB. At the time of the refugee hearing, the Applicant noted that the host had been sentenced to three years' imprisonment, and the other two members to two and a half years each.

[6] On October 31, 2006, the Applicant learned that the PSB had attended at his house with the intent of arresting him. They searched the house and informed his wife that he was wanted for violating religious regulations and disturbing the social order. Since then the PSB returned to his home on several occasions; on December 26, 2006, they showed the Applicant's wife the warrant that had been issued for the Applicant's arrest.

[7] On November 5, 2006, the Applicant obtained a fake passport. He arrived in Canada on December 8, 2006 and filed for refugee protection on December 11, 2006. On December 17, 2006, he first attended the Toronto Evangelical Holystone Church of America and has been attending and volunteering there every week since then.

Impugned Decision

[8] The Applicant's refugee hearing was held on October 3, 2008. Three members of the Board – Stephen Rudin (presiding member), Walter Kawun, and Cynthia Summers – unanimously found that the Applicant was neither a Convention refugee under s. 96 of IRPA nor a person in need of protection within the meaning of paras. 97(1)(a) or (b) of IRPA.

[9] The Board identified the determinative issue as whether, "because of his membership in an underground Christian church the claimant will face persecution, arrest and imprisonment by the

authorities if he returns to China" (Board decision, p. 3). The panel found that, although the Applicant had established that he was a practicing Christian in both China and Canada, he had not satisfied the burden of establishing "a serious possibility that he would be persecuted if he returned to China" (Board decision, p. 3).

[10] The Board made several factual findings that resulted in the denial of the Applicant's refugee claim. First, the Board noted the absence of documentary evidence supporting the Applicant's testimony that the PSB had issued a warrant for his arrest; it found, therefore, that the Applicant was not in danger of arrest and imprisonment (Board decision, p. 4). Second, the Board cited documentary evidence indicating that PSB raids focus on growing churches, not prayer meetings and Bible study groups held among family and friends in private homes. The Board found that a small house church would not attract the attention of the authorities and that the raid on the church did not occur (Board decision, p. 4). Third, the Board found that, although some reports suggested that the "patriotic" or "registered" churches in China were subjected to interference in doctrinal decisions and were forced to place the Chinese Communist Party above God, there was no direct verification of these reports. The Board therefore found that the Applicant would be able to practice his religion in a registered church if he were returned to China (Board decision, p. 5).

[11] The panel concluded by recognizing "that persecution of Christians does exist in the People's Republic of China and understands the claimant's subjective fear of persecution. However, in the particular circumstances of the claimant, the documentary evidence does not support that there is a serious possibility that he would be persecuted because of his religious belief. The panel places more weight on the documentary evidence than the claimant's testimony as the documentary

evidence is gathered from various sources that do not have a personal interest in the outcome of the hearing" (Board decision, p. 5).

Question at issue

[12] Although each party notes different specific factual findings of the Board's decision, broadly speaking, the only issue the Applicant and Respondent raise is whether the decision of the Board is reasonable.

[13] Findings of fact, including credibility findings, are reviewed on a standard of reasonableness. The Court will not interfere with the Board's findings unless they are made in a perverse or capricious manner, or without regard to the evidence (*Federal Courts Act*, R.S.C. 1985, c. F-7, para. 18.1(4)(d); *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 46). To be reasonable, a decision must be justified, transparent and intelligible, and fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

Applicant's Position

[14] The Applicant argues that the Board ignored evidence that supported his position. Specifically, the Applicant submits that there was documentary evidence in the record that noted that house church members, not just pastors or members of growing churches, were also detained, arrested, and beaten. The Applicant also points out that the Board erroneously noted the Applicant as being from Heilongjiang, and based its findings on reports from that region. However, while the

Applicant was born in Heilongjiang, the events he described took place in Tianjing. The Applicant argues that the Board's analysis is faulty since it cited information from the wrong province.

[15] The Applicant also cites differing information regarding the arrest warrant that was shown to his wife. The Applicant states that although the authorities do sometimes leave a copy of an arrest warrant with members of the subject's family, this is not necessarily the prevailing practice. In fact, the documentary evidence noted substantial regional variations.

[16] The Applicant also argues that the Board's finding that he could practice his religion in a registered church is unreasonable. The Applicant cites evidence which states that pastors in the registered churches must undergo "political reliability tests", which implies that pastors must adhere to government policies in their preaching. The Applicant concludes that mixing Communist party doctrine with Christian faith is unacceptable and does not constitute freedom of religion.

Respondent's Position

[17] The Respondent submits, generally, that the Board performed an extensive review of the documentary evidence. The Respondent notes that in *Khosa*, the Supreme Court of Canada noted that it is unacceptable for a reviewing court to reweigh the evidence (*Khosa*, above, at para. 61). The Respondent further argues that the Board reasonably found that the Applicant's evidence about the likelihood of persecution and the circumstances surrounding the arrest warrant, and that the Board's reference to the wrong province was immaterial to the outcome.

[18] The Respondent also submits that the Board could reasonably require further evidence to support the Applicant's testimony once his credibility was called into question, and defends the Board's suggestion that worshipping in one of the registered churches does not amount to persecution of the Applicant. The Respondent also maintains that the Applicant's standard for measuring freedom of religion is inapplicable since the *Charter of Rights and Freedoms* does not govern the situation in China.

Analysis

[19] Some of the issues raised by the parties are, I believe, inconsequential. For example, the reference to Heilongjiang rather than Tianjing is not material, especially since there is no argument that the persecution of Christians is worse in Tianjing. However, the Board's treatment of the perennially difficult issue of credibility leads me reluctantly to conclude that the Board's decision lacked a reasonable basis and is therefore reviewable.

[20] First, although the Board never explicitly makes a credibility finding, a negative assessment of the Applicant's credibility underlies all of its essential factual determinations. There is a presumption that a refugee claimant's testimony is true unless there is a reason for doubt (*Maldonado v. Canada (Minister of Employment & Immigration)*, [1980] 2 F.C. 302 (C.A.)). Further, the Board must give reasons for preferring documentary evidence to a claimant's evidence (*Okyere-Akosah v. Canada (Minister of Employment & Immigration)*, [1992] F.C.J. No. 411 (C.A.)); it must also clearly state when it finds a claimant not credible, and give reasons for doing so (*Hilo v. Canada (Minister of Employment & Immigration)*, [1991] F.C.J. No. 228 (C.A.)).

[21] In this case, the Board never explicitly states that it found the Applicant's testimony not credible, but it does reject his account of the raid on the house church, the existence of a warrant for his arrest, and his testimony that three other members have been sentenced to imprisonment for their membership in the house church and/or participation in its activities. Its stated reason for rejecting the Applicant's evidence is that it prefers the documentary evidence as not having "a personal interest in the outcome of the hearing" (Board decision, p. 5). While this is a purported "reason" for rejecting the Applicant's evidence, it is one that this Court has repeatedly found to constitute a reviewable error. As pointed out by Justice Snider in *Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037, this is "tantamount to stating that documentary evidence should always be preferred to that of a refugee claimant's because the latter is interested in the outcome of the hearing. If permitted, such reasoning would always defeat a claimant's evidence" (at para. 7) (see also *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336 at para. 54-59).

[22] Second, the Federal Court of Appeal has repeatedly determined that a refugee claimant's fear of persecution must have both a subjective and an objective basis (e.g., *Rajudeen v. Canada (Minister of Employment & Immigration)*, [1984] F.C.J. No. 601). Where the Board determines that a claimant is lacking in credibility, it would naturally follow that his or her claim would fail based on the lack of subjective fear of persecution (unless there is an objective basis for the fear, in which case a particularly brave or foolhardy claimant will not be punished for lacking a subjective fear (*Yusuf v. Canada (Minister of Employment & Immigration)*, [1992] F.C.J. No. 1049 (C.A.)). In this case the Board did not specifically mention the objective fear of persecution, but implicitly rejects it as unfounded. Regarding the subjective fear, however, the Board acknowledges and "understands"

it (Board decision, p. 5). Such a result is exceedingly peculiar given the Board's (again, implicit) determination that the Applicant lacked credibility.

Conclusion

[23] Credibility findings, particularly when they are determinative of the outcome as they were in this case, must be made explicitly. The Board's findings in that regard lacked transparency and thus call into question the reasonableness of the entire decision. Furthermore, while the Board was fully justified in relying on the documentary evidence provided to it, this Court has specifically cautioned against rejecting refugee claimants' evidence on the basis that other evidence is to be preferred since it comes from disinterested sources. Doing so constitutes a reviewable error.

[24] I am allowing this application for judicial review and returning the matter to the Board for re-determination by a different panel.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the matter is returned to the Board for re-determination by a different panel. No question of general importance has been submitted for certification and none is certified.

"Louis S. Tannenbaum"

Deputy Judge

AUTHORITIES CONSULTED BY THE COURT

1. *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (F.C.)
2. *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (S.C.C.)
3. *Syndicat Northcrest v. Amselem*,2004 SCC 47 (CanLII)
4. *Zhu v. Canada (M.C.I.)*, 2008 FC 1066
5. *Song v. Canada (M.C.I.)*, 2008 FC 1321
6. *Muthiyansa v. Canada (M.C.I.)*, 2001 F.C.T. 17
7. *Dundar v. Canada (M.C.I.)*, 2007 FC 1026
8. *Amarapala v. Canada (M.C.I.)*, 2004 FC 12
9. *Irripugge v. Canada (M.C.I.)*, [2000] F.C.J. No. 29
10. *Fosu v. Canada (M.E.I.)* (1994), 90 F.T.R. 182
11. *Bin v. Canada (M.C.I.)*, 2001 FCT 1246

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SOLICITORS OF RECORD

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