

Date: 20091120

Docket: IMM-1391-09

Citation: 2009 FC 1198

Ottawa, Ontario, November 20, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

**BAO YU ZHANG
(A.K.A. BAOYU ZHANG)**

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the decision made by Stephen Rudin, a Member of the Refugee Protection Division (“RPD”), dated February 24, 2009. The RPD determined that the applicant does not face a serious possibility of persecution based on her Christianity and is neither a Convention refugee nor a person in need of protection within the meaning of ss. 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”).

[2] At the end of the hearing, I indicated that the application was granted. Here are my reasons to so find.

FACTS

[3] The applicant is a 55 year old citizen of China who fears persecution based on her religion. The applicant claimed that she began attending a house church on June 6, 2004, at the suggestion of a friend, as a result of the death of the applicant's father. After attending a few meetings, she learned from her friend that the house church was illegal. Nevertheless, she continued to attend the underground church until she came to Canada on a visitor's visa in April 2006 to see her daughter.

[4] The applicant had planned to remain in Canada for six months, but then applied for and was granted an extension of her visitor's visa to help her daughter move into a new property.

[5] The applicant filed letters establishing that she has been an active member of the Living Stone Assembly in Canada since June 2006, and that she was baptized on December 25, 2006.

[6] On December 4, 2006 the applicant claims that while still in Canada, she had a phone conversation with her sister in China who informed her that the house church she used to attend was discovered and that all members had been arrested in November 2006. The applicant further alleged that the Public Security Bureau ("PSB") had visited her family three times that week wanting to know her whereabouts, and they left a house arrest summons.

[7] After learning this information, the applicant claims that she was scared and realized she could not go back to China. Therefore, she made an application for refugee protection on December

12, 2006. The applicant also alleges that the PSB continues to inquire about her and is putting a lot of pressure on her husband to convince her to return to China.

THE IMPUGNED DECISION

[8] The RPD Member accepted that the applicant was practising Christianity as a member of a house church in China, and that she continued her practice in Canada.

[9] However, he found that the applicant had not satisfied the burden of establishing a serious possibility of persecution if she returned to China, or that she would be subjected personally to a danger of torture or a risk to her life or a risk of cruel and unusual treatment or punishment by any authority in China. To come to that conclusion, Member Rudin relied on country documentation according to which the treatment of house churches varies regionally. Even in those areas where house churches with small number of members only are permitted, he noted that these unofficial churches encounter difficulties when their membership grows, when they arrange to use regular facilities for conducting the specific religious activities, when they forge links with other unregistered or overseas groups, or when they attempt to meet in large groups and travel within and outside the country for religious meetings.

[10] The RPD Member also mentions the *Annual Report of Persecution by the Government on Christian House Churches within Mainland China January-December 2007*, published by an American ONG, according to which only 6 people in the applicant's province of Anhui were arrested in 2007, all of them being either leader or missionaries.

[11] On the basis of that documentation, the RPD Member found it implausible that all nine members of the applicant's church group had been arrested. Not only was the church membership limited, but the applicant testified that she was not aware of any outside affiliations with other underground churches or churches outside of China. Moreover, the applicant did not describe herself in any way as a leader. Accordingly, the RPD Member preferred the documentary evidence to the applicant's testimony and found that, on a balance of probabilities, the house church would not be raided by the PSB, nor would the applicant be subject to arrest and imprisonment, and could return to China to practice her religion.

ISSUES

[12] The applicant raised two issues:

- a. Did the RPD err in failing to assess the summons in evidence?
- b. Did the RPD err in finding that the applicant would not face a serious possibility of persecution should she return to China?

ANALYSIS

[13] The assessment of the evidence is clearly a matter within the mandate and expertise of the RPD, and to that extent, the findings of the Member deserve a high degree of deference from this Court. The Member was entitled to decide adversely with respect to the applicant's credibility, on the basis of the implausibility of her story when viewed in light of the documentary evidence. This Court will not substitute its decision for that of a tribunal, except if the decision being challenged is

based on an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before it.

[14] The second issue raised by the applicant, however, does not relate exclusively to an assessment of facts. The decision of the RPD is premised on a particular interpretation of what persecution entails. To that extent, it raises a question of law to be reviewed against the standard of correctness.

[15] I agree with the applicant that the Board erred in failing to consider the summons when assessing whether she would face persecution should she return to China. The summons is clearly an important piece of evidence in the applicant's claim, as it corroborates her story that she would be arrested upon returning to China. The RPD had an obligation to assess the summons and to give reasons for either accepting or rejecting it as credible corroborating evidence.

[16] It is true that the Board mentioned it, but only to state in the "Allegations" section that the PSB had left a summons for the applicant. This was clearly not sufficient. We are left speculating as to why the Member did not ascribe more weight to it or nevertheless found that the PSB are not looking for the applicant and that she would not be subject to arrest and imprisonment upon her return to China. It is trite law that "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact": *Cepeda-Gutierrez v. Minister of*

Citizenship and Immigration (1998), 157 F.T.R. 35, (F.C.T.D.) at para.17 (see also *Bains v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 497.

[17] This error is particularly glaring in light of the fact that the applicant was found credible. This Court determined in *Yu v. Canada (Minister of Citizenship and Immigration)*, (1998) 150 F.T.R. 240 (F.C.T.D.) that the Board's failure to review a summons amounts to a reviewable error even when the applicant's testimony lacks credibility. One would think that such an error is compounded when the applicant has been found credible and the summons appears to corroborate her evidence. That error, in and of itself, is sufficient to render the RPD's decision unreasonable.

[18] But there is more. In its reasons, the RPD Member explicitly accepted the fact that the applicant is a Christian, and that she practiced her religion at an underground house church in China prior to coming to Canada. However, the Member found, on a balance of probabilities, that the house church would not be raided by the PSB and that the applicant would not be subject to arrest and imprisonment and could therefore return to China and practice her religion. The Board based its conclusion mainly on statistics found in one document in evidence according to which only 6 people were arrested during 2007. This finding is problematic.

[19] The RPD Member's focus on the number of arrests of Christians as an indicator of the likelihood of persecution is misplaced and erroneous. The number of arrests of underground Christians in China may speak to the ability of church members to stay underground and conceal their activities from the authorities. But the extent to which underground Christians are able to hide

their activities and avoid detection is irrelevant for the purpose of determining whether or not they are subject to persecution for their religion, and unable to freely practice their religion openly and in accordance with their fundamental belief system. The Court has made it clear that religious persecution can take any number of forms:

The fact is that the right to freedom of religion also includes the freedom to demonstrate one's religion or belief in public or in private by teaching, practice, worship and the performance of rites. As a corollary to this statement, it seems that persecution of the practice of religion can take various forms, such as a prohibition on worshipping in public or private, giving or receiving religious instruction or, the implementation of serious discriminatory policies against persons on account of the practice of their religion.

Fosu v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 1813; 90 F.T.R. 182, (F.C.T.D.) at para. 5.

[20] The case law makes it quite clear that any meaningful restriction on the applicant's ability to practice her religion as she wished in her house church, including a brief period of detention or a fine, would most certainly constitute religious persecution. The fact that it is illegal to belong to an unregistered or non state sponsored church in China would therefore tend to support a finding of religious persecution. I note in this respect that the same report upon which the Member relied on to say that there are very few arrests in the province of Anhui (where the applicant comes from) also shows that it is the province with the second greatest "persecution" of house churches. It appears, therefore, that there is not necessarily a clear correlation between arrests and persecution.

[21] For the foregoing reasons, I am therefore of the view that the decision of the RPD ought to be quashed.

ORDER

THIS COURT ORDERS THAT:

- The application for judicial review is allowed, and the matter is referred back to a differently constituted panel of the Board for redetermination.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR ORDER
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