

Federal Court



Cour fédérale

Date: 20091125

Docket: IMM-1674-09

Citation: 2009 FC 1210

Ottawa, Ontario, November 25, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

GUO HENG ZHOU

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 March 11, 2009. The RPD determined that the applicant does not face a serious possibility of persecution based on his 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”).

I. FACTS

[2] The applicant, a citizen of China, was a farmer in the Guangdong province before coming to Canada. After his father and his mother passed away in 2003 and 2006 respectively, the applicant was sad and was questioning the meaning of life. A friend introduced him to Christianity in April 2006.

[3] In May 2006, the applicant joined the house church his friend belonged to, and began to attend services on Sundays with a group of eleven others. He was told by his friend that the house church was illegal, but was given assurances that precautions were in place to avoid the house church's discovery. The group read the Bible, discussed it, and prayed silently. There was no singing or religious symbols at these services.

[4] On November 22, 2006, the applicant alleges that he received a phone call from his friend telling him that the Public Security Bureau ("PSB") had approached two members of his house church while they were preaching. His friend managed to escape because he was a lookout, but the two individuals had been arrested.

[5] The applicant went into hiding at the suggestion of his friend. While in hiding, his uncle who lives next door informed him that the PSB came to look for him a number of times, inquired regarding his whereabouts, searched his house but had left no summons.

[6] Feeling that he was no longer safe in China, the applicant arranged with a smuggler to come to Canada. He arrived in Canada on January 1, 2007 and applied for refugee protection on January 4, 2007. He joined the Living Stone Assembly Church upon arrival, and was baptized on April 7, 2007. He claims that the PSB has made 10 to 15 visits to his house between November 2006 and October 2008, and continues to do so.

II. THE IMPUGNED DECISION

[7] The RPD Member accepted that the applicant was a practicing Christian as a member of a house church in China and that he continued his practice in Canada. However, he found that the applicant did not face a serious possibility of being persecuted should he return to China. He determined, on a balance of probabilities, that the applicant would not be prevented from practising his religion at a registered church if he were to return to China, that his house church was not discovered, and that the PSB would not continue to search for him.

[8] The RPD Member began by noting that the applicant had no religious background, knew that the house church was illegal when he joined, and was aware of the potential consequences of discovery. The applicant was also aware that a registered church existed but did not consider attending because the church was located too far from his house. The other reason raised by the applicant for not attending a registered church was that he was told it conflicted with his church's values and beliefs. However, he did not investigate the alleged contradictions himself.

[9] The RPD Member then acknowledged the existence of persecution towards house churches in China and relied in particular on the report of the China Aid Association, according to which there has been an increase in persecution of house churches in 2007. According to this report, there are four main targets of persecution: house church leaders, house churches in urban areas, Christian publications and foreign Christians and missionaries living and working in China.

[10] The RPD Member also referred to the Hong Kong Christian Council, which stated that the province of Guangdong (where the applicant lived) has “the most liberal policy on religion in China, especially on Christianity”. The Executive Secretary of that association is reported to have met with local authorities and to have expressed the view that they usually tolerate activities of unregistered Christian groups, except if they have links with groups from outside China. He further indicated that those who have been targeted or arrested are considered “heretical” by many Christians. The RPD Member preferred the Hong Kong Christian Council’s evidence to that of the more critical organization called Human Rights in China, because the Executive Secretary of the Hong Kong Christian Council provided details and personal knowledge, and because his assessment that the enforcement of religious regulations is stricter in urban areas than in rural areas is corroborated by the documentation.

[11] The RPD Member then explained that religious persecution of Protestant house churches varies significantly from region to region, and depends on factors such as: whether there are close links with the West; evangelization; membership growth to become large-scale congregations; arrangements for regular use of facilities; whether an individual is a leader; and whether it is a rural

or urban area. Based on the fact that the documentation presented originates from a large number of different commentators ranging from foreigners living in China, religious organizations and non-governmental organizations, as well as activists around the country, the panel concluded that it was reasonable to expect that there would be persuasive evidence of house churches being raided and individuals being arrested if such actions indeed occur.

[12] The RPD Member recognized the existence of information on religious persecution in China, but concluded that it is not a serious possibility in the applicant's case, because he was just a member and did not hold any leadership role, because the meetings were held among friends and family in homes, because the group is small and has not forged links with the West, and because the group is located in a province which has one of the most liberal policy on religion in China.

[13] Finally, the RPD Member referred to the documentation according to which state authorities interfere in doctrinal decisions in registered churches, but found that there was no solid evidence supporting such an assertion.

[14] For all of these reasons, the RPD Member concluded that in the particular circumstances of the applicant, the documentary evidence did not support that there is a serious possibility that he would be persecuted because of his religious belief, even if the RPD Member accepted that persecution of Christians does exist in China. In coming to this conclusion, the RPD Member placed more weight on the documentary evidence than on the applicant's testimony, as the documentary

evidence is gathered from a variety of sources that do not have a personal interest in the outcome of this case.

III. ISSUES

[15] Counsel for the applicant raised a number of issues with respect to the decision of the Board. However, they all can be summarized in the following question: Did the Board err in its assessment of the evidence, and more particularly, in its finding that the applicant would not be subject to persecution upon being returned to China?

IV. ANALYSIS

[16] It is by now well-established that the assessment of evidence and the weight to be given to each piece of evidence are questions of fact that are within the expertise of the RPD Member. They are accordingly reviewable under the standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12; *Ali v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1274, [2008] F.C.J. No. 1589. In applying this standard, the Court cannot substitute its own appreciation of the appropriate solution to that of the tribunal.

[17] The applicant first argues that there is a contradiction between a finding where the panel determines that the applicant took various precautions to avoid the PSB and yet concludes later that the PSB did not raid the gathering and are not seeking the applicant. I have to agree with the

respondent that these two findings are not contradictory. Indeed, taking precautions in fear that something might happen does not mean that it will necessarily happen.

[18] The applicant stated in his evidence that there were no religious symbols because, as the applicant acknowledged, the home was not a church. The group had never had any problems with the authorities before, and it had been operating since early 2005. The evidence of the applicant in both his Personal Information Form (PIF) and his oral testimony regarding the November 22, 2006 incident was that the group was not raided. Although the group had subjective fear and took precautions, there was no objective evidence to support this fear. The fact that the PSB might have been concerned with people preaching publicly and arrested them as a result had nothing to do with their involvement with a house church. Moreover, the applicant had no personal involvement with the arrest of these two persons, and his uncle would not tell him why the PSB was looking for him. There were no warrants or summons left for him. There was, therefore, no factual basis for the alleged contradiction.

[19] The RPD Member accepted that there was some religious persecution in China. But in light of the particular circumstances of the applicant, the RPD Member found that the documentary evidence did not support a serious possibility that he would be persecuted for his religious beliefs. This is not a case where the documentary evidence was preferred to the applicant's evidence without providing any reasons. It is well established that when a tribunal prefers the documentary evidence over an applicant's testimony, it must clearly explain why:

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 reasons 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.

Han v. Canada (Minister of Citizenship and Immigration), 2009 FC 978, [2009] F.C.J. No. 1186, at para. 21. See also: *Chavarria v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1166, [2005] F.C.J. No. 2173; *Lin v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 254, [2009] F.C.J. No. 320.

[20] In the case at bar, the RPD Member explained its choice by the indirect source of the applicant's story, the absence of objective evidence, and because the situation of the applicant did not correlate with the factors found in the documentation that would put him at risk. The applicant had no leadership role, his description of the church group meeting was consistent with Bible study groups among friends and family that need not register, the group was small and no forged links with the West, and the group was located in a province with a liberal policy on religion. Thus, it cannot be said that the RPD Member offered no explanation for preferring the documentary evidence to the testimony of the applicant, however credible he was.

[21] More problematic is the finding that the applicant would not be prevented from practicing his religion at a registered church. This finding is peculiar since the panel noted in its reasons that the applicant would not want to practise at the state church because it is against his religious beliefs. It is not entirely clear what to make of this finding. Is the RPD's statement meant to imply that the applicant can attend the state church because there is no doctrinal distinction between it and the

underground church? Or does it reflect a view that the applicant should practice his religion at state sponsored churches despite his beliefs that these official churches do not accurately reflect the Christian teachings? In either instance, the RPD's finding is seriously flawed.

[22] The RPD Member reviewed the documentary evidence with respect to the doctrinal differences between the state church and the applicant's underground church, and came to the conclusion that there was no evidence of state interference. He found:

The documentation with respect to whether the registered church puts the CCP [Chinese Communist Party] above God makes reference to interference in doctrinal decisions in registered churches. However, no solid evidence supports this assertion. The article refers to "reports" but provides no source information. It notes that protestant leaders "are reportedly" not allowed to preach about the second coming of Christ or the Day of Judgement, but provides no sources in support of that statement. The article further notes that a former head of the Protestant Patriotic Association has been campaigning for "theological reconstruction" which opposes Christian beliefs, including justification by faith, the reliability of the Bible, and the primacy of faith in Jesus as the sole path to salvation. However, there is no evidence that this individual's views represent government action, planned or implemented.

Certified Tribunal Record, p. 10.

[23] However, there is clear evidence not only of theological differences between the official churches and the underground churches, but also of state controls registered churches in many ways. The U.S. Department of States *International Religious Freedom Report on China (2007)* indicates, for example, that "[M]any unregistered evangelical Protestant groups refused to register or affiliate with the TSPM/CCC [Three-Self Patriotic Movement/Chinese Christian Council] because they have theological differences with the TSPM/CCC" and that "[U]nregistered groups also frequently did

not affiliate with one of the PRAs [Patriotic Religious Associations] for fear that doing so would allow government authorities to control sermon content” (CTR., at p. 65). This report, it is worth noting, has been termed reliable because it originates from a reliable third party source.

[24] Similarly, we find in a Response to Information Request (CHN 102494.E, 27 April 2007) that is included in the Board’s own documentary package that “[R]egistered religious groups are required to provide the government with the names and contact information of their leaders and members” (CTR, at p. 101).

[25] The RPD cannot simply ignore this documentary evidence. It was clearly relevant to the issue the Board had to decide, which contradicted its findings. 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 “without regard to the evidence””: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 at para. 17.

[26] Moreover, the dismissal of the evidence on the campaign for “theological reconstruction” by the head of the Protestant Patriotic Association because there is no evidence that it represents government policy is unfair. Had the applicant been advised by the panel that it was going to make an issue of whether “theological reconstructionism” is state policy and was not going to give weight to a document that is part of the National Documentation Package, he could have responded by ensuring that the State church’s own declaration of goals was submitted at the hearing.

[27] If, on the other hand, the RPD was of the view that these differences were not significant and would not prevent the applicant from practicing his religion by joining the official church, it made a serious mistake. It is not for the Board to determine the reasonableness of the applicant's faith and how he should practice it. As the Supreme Court said in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] S.C.J. No. 46 (at para. 39), "In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith".

[28] It was inappropriate for the Board to question the genuineness of the applicant's faith on the ground that he had no previous religious background, and that he did not investigate the conflict between Christianity and its practice in official churches. The applicant was found credible, he continued his practice of Christianity in Canada, and the authenticity of his beliefs were not a matter for the Board absent evidence that his conversion to Christianity and his preference for his unregistered church were somehow dictated by untruthful motives. As I said in *Chen v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 677, [2009] F.C.J. No. 1391:

28. The only thing the Board purported to say on the subject was that if the applicant wishes to practice his religion in China, he could do so freely in a registered church "as vast and increasing numbers of Chinese citizens now do without fear of persecution". Not only is this finding inappropriate, but it is also inaccurate. It is not for the Board to dictate how the applicant should practise his faith. As can be seen from the documentary evidence (and, in particular, from a Response to Information Request dated 27 April 2007), some religious groups in China choose to remain unregistered because registration involves being monitored by the government and government sometimes interfere in doctrinal decisions of registered religious groups. It is perfectly legitimate for the applicant to choose

not to join these official churches, if he considers that this is the only way to remain true to his faith. Various reports indicate that the government of China does not allow the official Catholic Church to recognize the authority of the Vatican, and denies many central dogmas of the Catholic faith like the resurrection and the concept of individual salvation. It was therefore unreasonable for the Board to conclude that the disagreements between the patriotic church and the underground Christian church were of no consequence, and to focus on the use of the same Bible to conclude that both churches are the same, by and large. Not only is the evidence far from conclusive on this subject, but in matters of faith, personal choices should be paramount.

See also: *Zhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1066, [2008] F.C.J. No. 1341.

[29] It seems to me the RPD also erred in equating the possibility of religious persecution with the risk of being raided, arrested or jailed. This understanding of religious freedom is quite limited and does not take into account the public dimension of this fundamental right. If one has to hide and take precautions not to be seen when practising his or her religion, at the risk of being harassed, arrested and convicted, I do not see how he or she can be said to be free from persecution. As this Court said in *Fosu v. Canada (Minister of Employment and Immigration)* (1994), 90 F.T.R. 182, [1994] F.C.J. No. 1813:

5. 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. In the case at bar I feel that the prohibition made against Jehovah's Witnesses meeting to practise their religion could amount to persecution. That is precisely what the Refugee Division had to analyze.

[30] For the foregoing reasons, I am of the view that this application for judicial review ought to be granted. Counsels have not proposed any question for certification, and none will be certified.

ORDER

THIS COURT ORDERS that this application for judicial review is granted. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR ORDER
AND ORDER BY:** de MONTIGNY J.

DATED: November 25th 2009

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