

Federal Court



Cour fédérale

Date: 20100305

Docket: IMM-3627-09

Citation: 2010 FC 258

Ottawa, Ontario, March 05, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

YU JING CHEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada, dated June 30, 2009, wherein it was determined that the applicant was not a Convention refugee and not a person in need of protection. These are my reasons for determining that the application must be allowed and the matter reconsidered by a differently constituted panel.

Background

[2] Yu Jing Chen, the applicant, a Chinese citizen and a permanent resident of Ecuador, entered Canada on a student visa on June 27, 2007.

[3] The applicant's family left China in January 2004 and moved to Ecuador to begin a new life. The applicant's parents owned a restaurant in Guayaquil.

[4] Turning to the Christian faith to help her mourn the death of her younger brother in 2005, the applicant became a practising Christian and attended church regularly in Ecuador.

[5] Working at her parents' restaurant after school hours, a lieutenant of the Guayaquil Police named Miguel Junio showed up regularly to harass the applicant and allegedly attempted to sexually assault her on her birthday on March 7, 2007. Rejected by the applicant, the lieutenant continued to harass the applicant and her family at the restaurant and sent other officers to make trouble in the restaurant.

[6] The applicant claimed refugee status in Canada in October 2007 alleging that she feared the Ecuadorian police officer who attempted to sexually assault her. The applicant also claimed that she could not return to her country of citizenship, China, because the Chinese Communist Party has forbidden any true Christian worship.

[7] The applicant's claim for refugee status against China was partly based on her past alleged attendance of services at patriotic (registered/state) churches in China.

[8] At the time of her claim, the applicant stated that the Ecuadorian police officer continued to pose a threat to her family at the restaurant in Guayaquil and that the officer said that he would kill the applicant if he was to find her.

[9] Since her arrival in Canada, the applicant attends church services at the Toronto Chinese Alliance Church.

Decision Under Review

[10] The panel member found that the determinative issue in regard to the applicant's claim was the credibility of the claimant's oral testimony and Personal Information Form (PIF) narrative concerning her assertion that she is unable to practice her Christian faith in China. According to the applicant, as has been asserted in a number of similar cases, the patriotic church services in China acknowledge the Communist Party before God at the beginning of a service, and this is "not Christian".

[11] The panel found, on a balance of probabilities, that the applicant was not a credible witness regarding her claimed attendance at a patriotic church in China. It was found that the applicant's

story of attending patriotic church services was an invention to support her claim for refugee protection.

[12] Based on the totality of the evidence available to the panel, including documentary evidence, it was found on the balance of probabilities that the applicant can practice Christianity in a registered/patriotic church in China without any doctrinal constraint on the practice of a genuine Christian.

[13] The panel further rejected the applicant's assertion that she would not practice her religion in patriotic or registered churches in accordance with the basic foundational doctrines of the faith embraced throughout the world.

[14] Having found that the applicant has invented her experience of attending churches in China and waited more than five months after her arrival in Toronto before joining a church, the panel was of the view that, on the balance of probabilities, this was not a "good faith" claim.

[15] On the basis of the cumulative findings and negative inferences, the panel found that the applicant had not satisfied her burden of establishing a serious possibility that she would be persecuted or that she would be personally subjected to a risk to her life or a risk of cruel and unusual treatment or punishment or a risk of torture by any authority in the People's Republic of China.

Issues

[16] The sole issue is whether the panel erred in deciding that the applicant was not a Convention refugee or a person in need of protection due to negative credibility findings.

Analysis

[17] Since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, it has been held that a panel's decision concerning questions of fact and credibility are reviewable upon the standard of reasonableness: *Sukhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 427, [2008] F.C.J. No. 515; see also *Navarro v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 358, [2008] F.C.J. No. 463, at paras. 11-15.

[18] The panel's credibility analysis is central to its role as a trier of fact. As such, these findings are to be given significant deference by the reviewing Court. The panel's credibility findings should stand unless its reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[19] In this case, as in others where a similar claim has been advanced, the approach taken by the panel with respect to religious freedom and persecution for religious reasons is fundamentally flawed. Having accepted the applicant's evidence that she was a Christian, the panel focused excessively on its negative credibility findings and provided no analysis addressing whether the applicant's religion would put her at risk if she were returned to China: *Zhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1066, [2008] F.C.J. No. 1341, at paras. 12-13.

[20] As in *Zhu*, above, at paragraph 14, the panel erred as it did not elaborate on the applicant's expression of a personal conviction that she could not practise her faith in a state church as opposed to an underground church.

[21] The panel noted that the documentary evidence regarding doctrinal constraints in China is vague and without precision. With this vague and imprecise documentation, the panel then proceeded to conclude that the country documentary evidence is persuasive that the applicant can practice Christianity in a registered church without any doctrinal constraint.

[22] As Justice de Montigny found in *Zhou v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1210, [2009] F.C.J. No. 1502, the panel's conclusion that the applicant could practice her religion in a registered church in China is problematic. Justice de Montigny discussed this concern at paragraph 21 of his reasons in *Zhou*:

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.
[My Emphasis]

[23] The panel determined that the applicant could practice Christianity in a registered church in China. As was found in *Zhu* and *Zhou*, above, it is not for the panel to determine how and where the applicant should practice her faith.

[24] 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": *Zhou*, above, at para. 27.

[25] By excessively focusing on the applicant's credibility and by providing no analysis on whether the applicant's religion would put her at risk if she were returned to China, the panel did not evaluate the important question of religious freedom and did not take into account the public dimension of this fundamental right. If the applicant is to hide and take precautions not to be seen when practising her religion at an underground church, if she is returned to China (having rejected registered churches), it is difficult to see how the panel justified its finding that Ms. Chen would be free from persecution.

[26] While the panel turned its mind to a comparison of different versions of translated bibles used by the registered and underground churches, it did not address the broader consideration of religious freedom. I note that this Court said in *Fosu v. Canada (Minister of Employment and Immigration)*, (1994), 90 F.T.R. 182, [1994] F.C.J. No. 1813, at para. 5:

5 It appeared from a careful analysis of the evidence and the decision in the case at bar that this Court should intervene. I feel that the Refugee Division unduly limited the

concept of religious practice, confining it to "praying to God or studying the Bible". 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. [My Emphasis]

[27] Recognizing that the panel had the benefit of hearing the applicant's evidence directly and that there are questions regarding the applicant's credibility in this case, I find that the panel's reasoning process was flawed and the resulting decision fell outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[28] I also find that the process adopted by the panel and its outcome does not fit comfortably with the principles of justification, transparency and intelligibility. Accordingly, it is open to this Court to intervene: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, [2009] S.C.J. No. 12, at para. 59.

[29] No questions were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is granted and the matter is returned to the Board for redetermination by a differently constituted panel. There are no questions to certify.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3627-09

STYLE OF CAUSE: YU JING CHEN

AND

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 15, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: March 5, 2010

APPEARANCES:

Shelley Levine FOR THE APPLICANT

Tamrat Gebeyehu FOR THE RESPONDENT

SOLICITORS OF RECORD:

SHELLEY LEVINE FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario