

Federal Court



Cour fédérale

**Date: 20101207**

**Docket: IMM-595-10**

**Citation: 2010 FC 1239**

**Ottawa, Ontario, December 7, 2010**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**CHAO JIAN NI**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated January 5, 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

## **BACKGROUND**

[2] The Applicant is a citizen of the People's Republic of China. He arrived in Canada on June 15, 2007 and, on the same day, made a claim for refugee status. At that time, his only language was Mandarin. He alleges that, if he returns to China, he will be imprisoned, tortured and possibly killed because he is a Christian.

[3] The Applicant stated that, in December 2006, he became involved in an underground Christian church. He actively recruited members and offered his suburban home for the religious gatherings of their 15-member group. He claims that, during a semi-monthly gathering on April 15, 2007, officials from the Public Security Bureau (PSB) approached his house. The Applicant, who was acting as a look-out, warned the other attendees before fleeing the area and going into hiding. His wife, although not herself a Christian, also went into hiding because of her husband's religious activities in their home.

[4] The Applicant alleges that, in the weeks following this incident, the PSB charged him with involvement in an illegal church and continued to search for him. On June 1, 2007, with the assistance of a smuggler and under a false passport, the Applicant left China by commercial airline and arrived in Canada approximately two weeks later. Upon his arrival, he had no passport, no boarding passes and no luggage tags to document the airlines on which he had been a passenger. He was unable to provide the name under which he was travelling or to identify any of the countries

through which he had passed on his journey, including one country in which he had spent two weeks.

[5] On November 25, 2009, the RPD heard the refugee claim of the Applicant, who was represented by counsel. It found that, in light of all of the evidence and the cumulative findings, the Applicant was not credible. Moreover, the RPD found no serious possibility that he would be persecuted or personally subjected to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture if he were to return to China. This is the Decision under review.

## **DECISION UNDER REVIEW**

### **Credibility of the Applicant**

[6] The RPD stated that the “determinative issue” in this case was the credibility of the Applicant concerning his subjective fear of persecution as a member of an unregistered house church and the risk of persecution he would face as a Christian if he were to return to China. The credibility finding is a general one, based on the cumulative effect of the evidence before the RPD. The RPD relied, *inter alia*, on the reasoning in *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.) at 244, which states that:

[e]ven without disbelieving every word an applicant has uttered, a ... panel may reasonably find ... [that] a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony.

[7] First, the RPD addressed the Applicant's inability to provide the name or the country of issue on the passport under which he was travelling. The Applicant explained that he was never asked by the authorities of any country in which he travelled, including Canada, to provide such information. RPD found this explanation implausible.

[8] Second, the RPD questioned the Applicant about his port of entry (POE) interview with the Canada Border Services Agency (CBSA). In that interview, the Applicant stated that he could identify none of the countries through which he had travelled because he could neither read the boarding passes nor understand the languages in which the airport announcements were delivered. He claimed to have stayed in a single location for two weeks but, because the smuggler with whom he travelled would not allow him to leave that place, he did not know where he was. When asked later in the interview to provide his falsified passport, he said that he had given it to the smuggler. When reminded of his earlier statement that he had travelled alone, the Applicant then said that he had discarded the passport.

[9] The RPD was unconvinced by these explanations. The Applicant has twelve years of formal education and had travelled to Canada on commercial airlines. In the RPD's view, considering the printed materials on the aircraft, the logos on both the staff uniforms and the aircraft, and the boarding and landing announcements, the Applicant "would have to be aware of the country he was leaving and the destination of the flights."

[10] The RPD drew a negative inference from, what it viewed as, the Applicant's implausible explanations and inconsistencies.

### **Sincerity of Christian Belief**

[11] The RPD relied on the Applicant's oral testimony that he attended an underground Christian church in China. It also accepted that the Applicant is an active Christian in Canada, based on letters from members of the clergy in the Living Stone Assembly. Given the Applicant's limited exposure to Christianity in China, most of his religious knowledge would have been acquired after his arrival in Canada. The RPD appears to have found this an acceptable explanation for the Applicant's scant knowledge of Christianity at the POE interview compared to his more extensive knowledge of it at the hearing.

### **No Well-founded Fear of Persecution**

[12] The RPD found that, based on the documentary evidence, there is no serious possibility that the Applicant would be persecuted if he were to return to China and resume attending an unregistered Christian church, particularly considering where the Applicant would likely resettle and the nature of the church he would attend.

[13] Prior to coming to Canada, the Applicant lived and worked all of his life in Fujian province. A September 2005 report in the National Documentation Package notes that Fujian and Guangdong

have “the most liberal policy on religion in China, especially on Christianity.” Local authorities “usually” tolerate activities of unregistered Christian groups, particularly in rural areas. A number of unregistered churches have been allowed to operate for years, although authorities “usually take steps to discourage religious activity [that has] ... a link to groups from outside China.” Other documentary evidence indicated that, among the arrests that took place in China from 2005 to 2008, none were in Fujian province. The last reported arrests in Fujian province occurred in 2002 and, the RPD found, had arrests taken place since then, they would have been documented.

[14] The RPD also noted that the Applicant practised in an unregistered church, as do at least 30 million other Chinese Christians. According to a US Department of State (DOS) Report, unregistered churches typically encounter difficulties when they allow their membership to become large, when they arrange for the regular use of facilities for the purpose of conducting religious activities, or when they forge links with other unregistered groups. The RPD observed that the Applicant’s house church had done none of these things. Also persuasive was a report from the British Home Office that unregistered prayer and Bible study groups comprised of family and friends are legal in China.

[15] Based on this evidence, the RPD concluded that there was no serious possibility that the Applicant would be persecuted if he were to return to Fujian province, even if he were to resume practising his Christian faith as a member of an unregistered church, and even if the authorities found him. Indeed, it is unlikely that his church would be disrupted at all. Therefore, the RPD found, the Applicant does not have a well-founded fear of persecution.

[16] Ultimately, having failed to demonstrate a serious possibility of persecution or personal subjection to a risk to life or a risk of cruel and unusual treatment or punishment, the Applicant did not meet the definition of a Convention refugee under section 96 of the Act or a person in need of protection under section 97 of the Act. For this reason, the RPD rejected his claim.

## **ISSUES**

[17] The following issues arise in this application:

1. Whether the RPD's credibility findings were reasonable;
2. Whether the RPD's finding that the Applicant did not meet the definition of a Convention refugee under section 96 of the Act was supported by the evidence;
3. Whether the RPD erred in finding that a section 97 claim did not exist.

## **STATUTORY PROVISIONS**

[18] The following provisions of the Act are applicable in these proceedings:

### **Convention refugee**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

### **Définition de « réfugié »**

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe

social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

#### **Person in need of protection**

#### **Personne à protéger**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,



protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

**Person in need of protection**

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

**Personne à protéger**

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

**STANDARD OF REVIEW**

[19] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1

S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead,

where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] The RPD's decision is based in part on its assessment of the Applicant's credibility. The determination of credibility is within the expertise of the Board. For this reason, credibility findings attract a standard of reasonableness on review. See *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] F.C.J. No. 732 at paragraph 14.

[21] The Applicant has also challenged the RPD's finding that he does not meet the definition of a Convention refugee. Here, the determination of a legal issue is inextricably intertwined with the determination of facts. Such questions of mixed fact and law are reviewable on a standard of reasonableness. See *Dunsmuir*, above, at paragraph 164.

[22] Similarly, the Court will consider on a standard of reasonableness the RPD's determination that, based on the findings, a section 97 analysis was unnecessary. See *Dunsmuir*, above, at paragraph 164.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

## **ARGUMENTS**

### **The Applicant**

#### **Credibility Findings Flawed**

[24] The Applicant argues that it was unreasonable for the RPD to draw a negative inference from his inability to state the name on his false passport. The RPD could have taken notice of the fact that travellers regularly designate one person to speak on their behalf, allowing the others to pass through customs without being questioned.

[25] The Applicant also argues that he provided an acceptable explanation for not knowing the names of the countries through which he passed on his way to Canada. He was unfamiliar with the language and the environment and did not know where he was. Moreover, even if the RPD’s implausibility finding was reasonable, it is irrelevant to the central issue, which is whether or not the Applicant had a reason to fear persecution upon his return to China. If the RPD did see the finding as relevant, it failed to indicate this in the reasons. See *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 150 at p. 157 (F.C.A.).

### **RPD Erred in Reviewing the Evidence**

[26] The RPD's reliance on documentary evidence to support its finding that the Applicant has no well-founded fear of persecution was unreasonable. The Applicant argues that the documentary evidence in no way supports a finding that he has no reason to fear persecution.

[27] The Applicant draws particular attention to paragraph 28 of the Decision. In that paragraph, the RPD concludes that, because the Applicant is a lay practitioner and not a church "leader," there is no serious possibility that he will be persecuted. However, the RPD fails to recognize that, as a person who attends a church where the leader may be arrested, the Applicant suffers persecution. Similarly, in concluding that, if the Applicant were to return to Fujian, his house church would likely never be disturbed, the RPD fails to recognize that the constrained and clandestine way in which the Applicant is required to practise his religion and the deprivation he suffers at having no proper church building both constitute persecution.

[28] In short, the Applicant submits that the RPD equated the Applicant's chance of arrest with his fear of persecution and, in so doing, failed to recognize that the inability to practise one's religion openly and freely constitutes persecution, which is worthy of protection under the Act. See *Fosu v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1813 (T.D.). As Justice Yves de Montigny commented in *Guo Heng Zhou v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1210 at paragraph 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.

[29] The Applicant also argues that the RPD made contradictory findings of fact. For example, the RPD finds in paragraph 27 of the Decision that members of an unregistered church were more likely to face problems where their membership grew, or they arranged for the regular use of facilities, or forged links with other groups. In paragraph 28, however, the RPD stated that authorities were unlikely to harass members of an unregistered church. This contradiction represents an error.

[30] Again, in paragraph 19 of the Decision, the RPD accepts that the Applicant's house church was raided, but in paragraph 27 it implies that it was not. In so doing, the RPD, at minimum, failed to make express findings of fact regarding the raid and, at worst, contradicted itself. The Applicant argues that these unclear and contradictory findings constitute reviewable errors. See *Armson*, above, at page 157; and *Lin v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 254.

[31] Finally, the Applicant submits that the RPD misapprehended the evidence before it, as there was clear evidence that churches in Fujian province had been closed down during the material time, which corroborates the Applicant's oral evidence regarding his own experiences.

### **RPD Erred in Dismissing the Section 97 Claim**

[32] The Applicant argues in the alternative that, if he does not meet the definition of a Convention refugee under section 96 of the Act, then his inability to practise his religion openly and freely constitutes cruel and unusual punishment under section 97 of the Act. The Applicant argues that the RPD cannot dismiss the section 97 claim without reasons, given that the section 97 analysis is distinguishable from that conducted under section 96.

### **The Respondent**

#### **Credibility Findings Were Reasonable**

[33] The Respondent argues that, although the inconsistencies in the Applicant's oral evidence concerned his transit to Canada and not his claim of persecution, it was reasonable for the RPD to conclude that, as a whole, they warrant a negative credibility finding.

#### **Evidence Supported the RPD's Section 96 Finding**

[34] The RPD based its conclusion on a thorough review of the documentary evidence which, the Respondent argues, provides very few instances of religious persecution in Fujian province. It is within the RPD's discretion to prefer documentary evidence over the Applicant's own testimony. In *Yu v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 310 at paragraphs 31-33, Justice

Russel Zinn of this Court held that the RPD acted reasonably in doing exactly that, even though, in that case, the credibility of the applicant was not at issue:

[31] In this case, the only evidence that was provided to the Board that the applicant's house church was raided was his own testimony. There was no corroborative evidence of any sort provided. Although he had otherwise been found credible, in that the Board accepted his evidence that he was a Christian and attended a house church in Fujian, there was other evidence before the Board that brought his evidence of the raid into question.

[32] The other evidence was documentary evidence. It was not directly contradictory of the applicant's testimony in that it did not say that no house churches had ever been raided in Fujian Province. That is hardly surprising as one is unlikely to find a report that something has not happened because it is events, not non-events, that are reported. Nonetheless, the documentary evidence does lead to an inference that no such raid occurred....

[33] In this case, the Board chose to accept the independent documentary evidence over the applicant's testimony. It is evident from a reading of the decision as a whole that it did so because it preferred the evidence from "a large number of different commentators ... none of whom have a personal interest in the pursuit of an individual claim for protection" to the applicant's evidence in support of his own claim for protection. Its weighing of the evidence on this basis cannot be said to be unreasonable.

[35] The Respondent submits that the reasoning in *Yu*, above, is applicable to this case. Here, the documentary evidence does not support the Applicant's oral evidence that his house church was raided by the authorities in Fujian province. Indeed, there were no reports that authorities had targeted house churches from 2005 to 2008, and the Applicant's house was not the type that would attract the attention of authorities in any event. Moreover, the documentary evidence indicated that there was less than a mere possibility that the Applicant would be persecuted if returned to Fujian. For these reasons, the Respondent argues, the RPD's Decision was reasonable.

### **Section 97 Analysis Was Unnecessary**

[36] The RPD acted reasonably in finding that a section 97 claim did not exist. First, an applicant cannot rely on evidence of a country's general human rights situation to establish a section 97 claim. Rather, the Applicant must show that the potential risks are personalized. In the instant case, the Applicant did not demonstrate that, on a balance of probabilities, he was personally targeted and his life was at risk.

[37] Second, the RPD had already found, based on the documentary evidence, that Christians in Fujian province do not face a serious possibility of persecution as it is defined under section 96 of the Act. The section 96 threshold of "serious possibility of persecution" is lower than the section 97 threshold of "risk to life." If the documentary evidence is insufficient to satisfy section 96, it follows that it will be unable to satisfy section 97.

### **ANALYSIS**

[38] The Applicant has raised a variety of issues in this application, but I think the Decision must stand or fall on his contention that there is no clear finding by the RPD that the raid upon his church did not take place.

[39] Justice Robert Barnes was faced with exactly the same problem in *Lin v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 254, and resolved the matter as follows:



**8** The Board found that Ms. Lin's claim to a well-founded fear of persecution in China was not credible. It also found that her evidence was not consistent with the objective country documentation. There is, though, nothing in the decision which identifies any concern with Ms. Lin's evidence concerning the police raid on her church or the initial arrest of five of the congregants.

...

**15** For the Board to fairly rely upon general evidence of a diminished risk of religious persecution in China it was critically important to make specific findings about the truthfulness of Ms. Lin's account of the police raid on her church. That is so because the generalized risk facing Christians in China had to be assessed against her particular profile including her past experiences with the authorities. It was not enough for the Board to find that the instances of persecution of individual Christian congregants are now fairly rare if the authorities in her community were of a persecutory persuasion as evidenced by their earlier behaviour directed at Ms. Lin and the others in her church. Her situation may well have been one of increased risk thus taking her case outside of the statistical norm in China, and it was an error for the Board not to have conclusively resolved that point. It was also not a complete answer to Ms. Lin's alleged predicament to find that the local authorities would no longer be interested in her. What the Board needed to ask itself was whether, in her unique situation, she would be at risk of persecution if she returned home and resumed her religious practices.

[40] In the present case, it is not possible to say that the RPD made a clear finding that the raid on the Applicant's church did not take place. This being the case, I think it would be unsafe to allow the Decision to stand; it must be returned for reconsideration.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The application is allowed. The Decision is quashed and returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-595-10

**STYLE OF CAUSE:** CHAO JIAN NI

Applicant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 28, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

**DATED:** December 7, 2010

**APPEARANCES:**

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