Federal Court  Cour fédérale

Date: 20110407

Docket: IMM-3680-10

Citation: 2011 FC 431

Ottawa, Ontario, April 7, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

XIAO LING LIN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Refugee Protection Division (the Board) dated June 10, 2010 dismissing an application by the Minister of Public Safety and Emergency Preparedness (the Minister) to vacate the Respondent's claim for refugee protection.

[2] Based on the reasons below, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Respondent, Xiao Ling Lin, is a citizen of China. He arrived in Canada and sought refugee protection on February 7, 2007. He claimed to have a well-founded fear of persecution because he sold Falun Gong books and CDs in his bookstore in Changle City, Fujian Province, China. The store was searched by the police in November 2006. Although he kept the banned materials out of sight, the police found the Falun Gong materials. The Respondent claimed to have escaped while the search was being conducted and later fled to Canada.

[4] Fourteen (14) days in advance of the Respondent's hearing before the Immigration and Refugee Board, the Respondent submitted copies of his license to operate a bookstore, alleged Public Security Bureau (PSB) search warrants, a notice of closure of his bookstore from the Industry and Business Administrational Management Bureau and three summons requiring him to report to Chinese authorities. Despite the fact that this was outside of the 20-day period for disclosure, the tribunal accepted the evidence pursuant to its discretion to do so under the rules. On January 14, 2009 the tribunal concluded that, on a balance of probabilities, the Respondent was involved in the sale of Falun Gong materials which came to the attention of the Chinese authorities, giving rise to more than a mere possibility that the Respondent would face persecution in China. A notice of decision was issued the following day, and written reasons followed on February 19, 2009.

[5] Prior to the hearing, the Hearings Officer began the process of attempting to verify the authenticity of the Respondent's documents. The documents were sent to the "Migration Integrity Officer" in Guangzhou, China in December 2009. January 22, 2009 the Consulate General of Canada in Guangzhou forwarded the documents to the Consular and Cultural Division of the Foreign Affairs Office of Fujian Provincial People's Government. On March 31, 2009 the Minister was informed by the Chinese government via diplomatic note that investigations by the pertinent authorities failed to find any record on file concerning the submitted Business License and that the Changle PSB had no police officers matching the names of the police officers on the submitted summons.

[6] As a result of this information, the Minister brought an application to vacate the Respondent's Convention Refugee (CR) status on June 30, 2009. The Minister based his application on the grounds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter which, if known to the tribunal, could have resulted in a different determination.

B. *Impugned Decision*

[7] The Board held the vacation hearing on January 15, 2010. The Minister took the position that the Chinese authorities had concluded that the Respondent's documents were fraudulent and that there was therefore no basis upon which the tribunal could have determined that the Respondent was a CR. The Minister argued that the Respondent's claim was false and that he misrepresented facts relating to a relevant matter.

[8] By way of reasons dated June 10, 2010, the Board dismissed the Minister's application.

[9] The Board made two findings. First the Board found that the Minister sought the views of the alleged persecutor with respect to the merits of the application and the Respondent's designation as a CR. The Board found that the evidence of the Chinese authorities might be either true or false, and it would be the panel hearing the refugee claim that would be in the best position to weigh the evidence and make that determination.

[10] Secondly, the Board found that the Minister approached the Chinese authorities without regard for the protected status of the Respondent as a CR, and failed to take appropriate steps to protect the Respondent. In the view of the Board, this was fatal to the Minister's application.

II. Issues

[11] The Applicant raises the following issues:

(a) Did the Board err with respect to its analysis under subsection 109(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] by not properly considering the Minister's new evidence?

(b) Did the Board err by not conducting an analysis under subsection 109(2) of the IRPA with respect to the remaining evidence that would support the Respondent's CR status?

[12] The Respondent raises the following issues:

(a) Did the Board err in concluding that the Minister's evidence was insufficient for the Minister to meet the onus of proof and establish the facts to a balance of probabilities with respect to the misrepresentation?

(b) Was the disclosure in this case a breach of the Respondent's rights under the *Privacy Act*?

(c) Was the Board correct in dismissing the application after finding that there was an abuse of process?

[13] In my view, the issues are best summarized as:

(a) Did the Board err in concluding that the Minister's evidence was insufficient to establish misrepresentation?

(b) Did the Board err in dismissing the application after finding that there was an abuse of process?

III. Legislative Scheme

[14] Section 109 of the IRPA allows the Minister to apply to vacate a decision to allow a claim for refugee protection if the decision was obtained as a result of misrepresentation:

Vacation of refugee protection	Demande d'annulation
109. (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding	109. (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet

material facts relating to a relevant matter.	pertinent, ou de réticence sur ce fait.
Rejection of application	Rejet de la demande
(2) The Refugee Protection Division may reject the application if it is satisfied that other sufficient evidence was considered at the time of the first determination to justify refugee protection.	(2) Elle peut rejeter la demande si elle estime qu'il reste suffisamment d'éléments de preuve, parmi ceux pris en compte lors de la décision initiale, pour justifier l'asile.
Allowance of application	Effet de la décision
(3) If the application is allowed, the claim of the person is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified.	(3) La décision portant annulation est assimilée au rejet de la demande d'asile, la décision initiale étant dès lors nulle.

IV. Standard of Review

[15] Decisions rendered pursuant to section 109 of the IRPA are decisions of mixed fact and law, and as such are entitled to deference by the Court. The appropriate standard of review is the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Chery*, 2008 FC 1001, 334 FTR 148 at para 19). The Court will not disturb the Board's finding so long as the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Argument and Analysis

A. *Did the Board Err in its Analysis Under Section 109?*

[16] The Minister submits that the Board failed to engage in a proper analysis of the Minister's evidence under either subsection 109(1) or 109(2). It is the Minister's contention that instead of engaging in the analysis required by the statute, the Board focused on the entirely extraneous and irrelevant consideration of how the Minister obtained the evidence. The Minister posits that by focusing on the Respondent's privacy rights, the Board examined an issue that was not before it and was not within the scope of the Board's duty at the vacation hearing. The Minister's position seems to be that the Board did not actually consider the credibility or sufficiency of the new evidence, and such failure amounts to an error of law.

[17] The Respondent takes the view that the reasons of the Board reveal that the Board did in fact consider the evidence and determined, on a balance of probabilities, that the Minister did not meet the burden of showing that the Respondent misrepresented a material fact.

[18] As I read the reasons, it is clear that the Board considered the Minister's evidence. The Board was aware that the Minister took the communication from the Chinese authorities to lead to the indubitable conclusion that the Respondent directly misrepresented facts relating to relevant matters, namely, the existence of the bookstore, the search of the premises and seizure of the

material and the summonses requiring the Respondent to appear. However, the Board did not share this view. The Board stated at paras 27 and 28:

> In the context of the determination of the refugee claim itself, the panel hearing that case would be in a position to weigh such evidence in the context of the evidence overall, and deal with it in a way which would be not only appropriate, but sensitive to the issues of credibility and trustworthiness arising generally in the case. Evidence going to the question of inclusion should be dealt with, as much as possible, within the process of determination of the claim, rather than as a post-hearing application to vacate. It is in the process of the actual determination of the claim that the strengths and weaknesses of evidence going to inclusion can best be dealt with.
>
> For instance, it is clear that what the Respondent says about his treatment by the Chinese authorities, in particular the PSB, is either true or false. Similarly, what the Chinese authorities say in their communication to the Canadian authorities is either true or false. However, if what the Respondent said about the Chinese authorities is true, then that might be a reason to consider that what the Chinese authorities say about the Respondent is false. That is, these matters are inextricably intertwined. It is the panel hearing the refugee claim who is in the best position to understand the body of evidence as a whole, and to make the appropriate determination.

[19] Perhaps it is not as clear as the Minister would like, but it is obvious that the Board found the Minister's evidence to be insufficient to meet the requirement of section 109. The evidence was, in the mind of the Board, not irrefutable. The Board did not find itself in a position to be able to say it preferred the Minister's evidence over that of the Respondent. Although the Board does not spell it out as clearly as the Respondent does in his submissions, the Board did not find, on a balance of probabilities, that the Minister's evidence showed that the Respondent misrepresented relevant facts to the tribunal.

[20] The Supreme Court has recently reiterated that the onus is on the Minister to provide sufficient evidence to terminate a previously recognized refugee status, stating in

Németh v Canada (Justice), 2010 SCC 56, 91 Imm LR (3d) 165 at para 109, "under the Refugee Convention, persons who have established that they meet the refugee definition should not bear the burden of proving that they continue to do so." Specifically, at para 110, "the IRPA makes it clear that it is up to the Minister of Citizenship and Immigration (MCI) to apply for the order that refugee protection has ceased and to advance the reasons in support of the application." In the present case, the Board expressed dissatisfaction with the reasons advanced by the Minister in support of the application.

[21] Furthermore, contrary to the Minister's submissions, the Board made it quite clear that it was concerned with the credibility of the Minister's evidence, given its provenance. The Board noted at para 26 that "What the Canadian authorities did do, however, was involve the alleged persecutor in an assessment of the evidence of the claims which had been brought by the claimant, or respondent." The Board very clearly expressed its concern with the source and method by which the Minister obtained the evidence. Though the Minister argues that this is an irrelevant consideration, I disagree. It clearly has an impact on the probative value that may be assigned to the evidence. And it is trite law that the Board is in the best position to weigh and evaluate the submitted evidence. More specifically, findings in a vacation hearing are entitled to the highest level of deference, as they are based on an assessment of the claimant's credibility and on the weighing of the evidence submitted by both parties (*Mansoor v Canada (Minister of Citizenship and Immigration)*, 2007 FC 420, 61 Imm LR (3d) 227 at para 24).

[22] The Respondent submits that the Board made a decision that was reasonably open to it based on the totality of the evidence. The Board considered the findings of the previous tribunal,

the new evidence and the procedures followed in obtaining the communications from the Chinese authorities, and concluded that the Minister did not advance sufficient evidence to warrant vacating the Respondent's CR status. I agree with the Respondent. The outcome falls within the range of acceptable, defensible outcomes.

[23] The Minister further submits that the Board erred in not conducting a review of the untainted evidence to determine whether there was sufficient evidence to support a convention refugee finding for the Respondent, as mandated by subsection 109(2).

[24] There is no basis for this argument. It is logically untenable to hold that the Board must nonetheless analyze whether the Respondent would be able to maintain a claim for CR status based on the remaining untainted evidence even after concluding that it is not in a position to prefer the Minister's evidence over that of the Respondent. The Board never came to the conclusion that the Respondent's evidence was "tainted" in the first place, thus, there was no need to analyze a claim based on the remaining evidence. The test for vacation is clear. As stated by Justice Yves de Montigny in *Mansoor*, above, at para 23:

> [23] The parties do not dispute the proper approach to an application to vacate a decision granting refugee status. The tribunal must first conclude the decision granting refugee protection was obtained as a result of direct or indirect misrepresentations, or of withholding material facts relating to a relevant matter. Having found so, it may nevertheless deny the application if there remains sufficient evidence considered at the time of the determination of the claim for refugee protection to justify refugee protection: see, for example, *Canada (Minister of Citizenship and Immigration) v. Pearce*, [2006] F.C.J. No. 646, 2006 FC 492; *Naqvi v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1941, 2004 FC 1605
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> [Emphasis added]

[25] I find no reviewable error in the Board's section 109 analysis.

B. *Did the Board Err in Considering How the Minister Obtained the Evidence?*

[26] The Board found fault with the way in which the Minister obtained the evidence given the protected status of the Respondent, writing at para 37:

> The protection of persons is at the core of the refugee determination system. The identification of those who genuinely need protection is critical to [the] integrity of that system. In investigating the merits, bona fides or veracity of claims brought before the Division, the Minister must balance, and be seen to balance, the need to protect the individual, including those who have been determined to be Convention refugees, against the need, in the public interest, to detect and prevent fraud. In this case, there is no evidence that any care was taken to protect the Convention refugee, a protected person. This is fatal to the Minister's application.

[27] The Minister submits that a consideration of the method by which the Minister obtained the evidence is irrelevant and not at issue. The Minister argues that the protocol followed by the Minister in obtaining the evidence was consistent with the case law and did not violate the Respondent's privacy rights. The Minister submits that the Board erroneously and microscopically read the case law and mischaracterized what the Minister was attempting to do in verifying the documents.

[28] The Respondent argues that the Board did not err in determining that the Respondent's privacy rights under the *Privacy Act*, RSC 1985, c P-21 were violated by the Minister's disclosure of personal information to the agents of persecution since the disclosure of personal information in

this case was not consistent with the purpose of determining a refugee claim. The Respondent further argues that the Minister's vacation application constitutes an abuse of process in that he failed to ask for a postponement and the subsequent challenging of the evidence deprived the Respondent of an opportunity to integrate that evidence into his claim.

[29] The Minister relied on two cases to illustrate that this Court has found it acceptable to verify documents with foreign governments, even those alleged to be the claimant's persecutors. The Board examined these cases, excerpting a section from *Moin v Canada (Minister of Citizenship and Immigration)*, 2007 FC 473, 157 ACWS (3d) 603. There, the Federal Court found, relying on the decision of the Court in the case of *Igbinosun v Canada (Minister of Citizenship and Immigration)*, 87 FTR 131, 51 ACWS (3d) 918, that disclosure to the state authorities, the alleged persecutors, was essential to determine if the Respondent fell within the exclusion provisions of Article 1F (war crimes, serious non-political crimes) of the Schedule to the IRPA:

> [35] According to s. 8(1) of the *Privacy Act*, the person who provides the government with personal information must consent for the government to subsequently disclose the information. S. 8(2) then lists exceptions to that general rule. One of those exceptions, at paragraph 8(2)(a), allows the government to disclose information so long as the act of disclosure is for the same purpose, or one consistent with, the purpose of originally collecting the information.
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> [36] In the present case, the purpose for which Mr. Moin's personal information was collected may be expressed as general immigration purposes or, more specifically, as admissibility and refugee determination purposes. Under either interpretation, using the information to determine whether Mr. Moin might be excluded from Convention refugee status was a reflection of the same purpose or, in the alternative, a purpose consistent with that which originally justified the collection: *Rahman v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 2041 (F.C.T.D.) (QL).
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> [37] Mr. Moin indicated in his refugee intake interview that he was charged with corruption and misuse of public office, thereby

raising the possibility of exclusion under Article 1(F)(b) of the Convention. Appropriate inquiries were made to determine whether he was excluded from the refugee definition. There is no evidence that authorities in Pakistan were advised Mr. Moin had made a claim for asylum. In any event, the disclosure was essential to determine if he fell within Article 1(F). I believe the following paragraph taken from the decision reached by Justice Donna McGillis in *Igbinosun v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1705 (F.C.T.D.) (QL), is a complete answer to Mr. Moin's argument:

> 6. In the present case, the evidence establishes that the identity of the applicant was disclosed to Nigerian police officials to determine whether he had been charged with the offence of murder. There is no evidence to indicate that any confidential information given by the applicant in his personal information form was disclosed. The objection to the admissibility of the telex on the basis that the Privacy Act was violated has been advanced in the absence of a proper evidentiary framework and, as a result, must be rejected. Alternatively, even if Canadian officials did provide confidential information from the applicant to the Nigerian police, the disclosure was made for the purpose of permitting the Minister to formulate an opinion as to whether the claim of the applicant raised a matter within the exclusionary provision in subsection F(b) of Article 1 of the Convention. [See subparagraph 69.1(5)(a)(ii) of the *Immigration Act*.] Since the applicant provided the information for immigration purposes, its use, if any, by the Minister or his representatives was clearly "for a use consistent with that purpose" within the meaning of paragraph 8(2)(a) of the *Privacy Act*.

[38] In light of the foregoing, I agree with the Minister that the Board was not required to address Mr. Moin's arguments concerning his refugee *sur place* claim. A tribunal is not required to address such an argument where the applicant has been judged not to have presented any credible evidence substantiating his claim: *Barry v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 266, 2002 FCT 203; *Ghribi v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1502, 2003 FC 1191; *Lai v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 230, 2005 FC 179.

[30] The Board distinguished the cases from the present matter in two ways. In *Moin* and *Igbinosun*, above, the information was sought to determine whether or not the claimants were excluded under Article 1F. The Board found that making inquiries regarding potential exclusion to be essentially different from making inquiries from the alleged persecutor regarding matters internal to the refugee claim, such as an assessment of the evidence. Secondly, the inquiries made in *Moin* and *Igbinosun*, above, were made prior to the determinations of the claims, and the results were disclosed before the hearing in each case.

[31] The Minister argues that the Board distinguished these cases in a blind fashion. The Minister submits that the Board read the cases microscopically to hold that the Minister may only make inquiries in the case of exclusions. The Minister emphasizes that the Minister is able to make an application to vacate CR status at any time, so the fact that the inquiries in the present matter were made after the hearing is not in any way significant.

[32] I do not read the reasons of the Board the same way as the Minister. Like the Respondent and the Board, I share the view that in principle the Minister has the right to send documents to foreign governments to be verified. However, at issue in this matter is the manner in which the documents were verified. This is a legitimate concern to which the Board rightfully turned its attention.

[33] While cognizant of the fact that, in accordance with the legislation, personal information can be disclosed for a use consistent with the purpose for which the information was obtained, the Board nonetheless determined that the Respondent's privacy rights had been violated because "seeking the

views of the alleged persecutor or perpetrator on the quality, provenance or credibility of the evidence alleged against that person, institution or state" was, in this case, not a use consistent with the purpose of determining a refugee claim. The Board did not conclude that inquiries could only be made with respect to exclusions, rather, that consistent with the case law, disclosure or personal information must be consistent with the purpose of determining a refugee claim.

[34] I agree with the Respondent that framing the issue as general immigration purposes, as suggested by the Minister, might be too broad. The Board focused largely on the fact that inquiries were made after the Respondent had been granted protective status. In this specific instance, it is hard to see how providing the Respondent's documents to a government known to be repressive without first taking steps to protect the Respondent's identity would be in line with the objectives of the IRPA, which the Board reproduced:

> Objectives — refugees
>
> (2) The objectives of this Act with respect to refugees are
> (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
> (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
> (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
> (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
> (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;[…]

[35] The Minister maintains that the Respondent's documents were provided to the Chinese authorities for immigration purposes, and the fact, acknowledged by the Board, that the Minister did not disclose that the Respondent had made a refugee claim or was granted convention refugee status means that the appropriate protocol was followed. This directly contradicts the Board's findings that "no steps were taken, or criteria applied to protect the protected person."

[36] Again, the Minister fails to raise a reviewable error. Having rightly determined that the Respondent's privacy rights were in issue, the Minister had a duty to ensure that the disclosure was appropriately limited and proportionate. As Justice Danièle Tremblay-Lamer wrote in *Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000, 278 FTR 254 at para 37, "The RPD should consider alternatives to full disclosure in order to strike a balance between the need for disclosure and the right to privacy." The Minister took no steps. The Minister's submission that redacting the Respondent's name from the documents would be counter-productive strikes me as spurious. The Respondent's identity was never at issue, only the authenticity of the documents was questioned. Their genuineness could have been examined without revealing the Respondent's name to the Chinese authorities, whom, a tribunal had already concluded, were more than merely likely to persecute him.

[37] I, the Board and the Respondent recognize that in principle the Minister has the duty to uphold the integrity of the Canadian refugee determination system and accordingly the right to verify documents. However, I accept the Respondent's submission that the manner in which the verification is conducted must be tailored to ensure that the claimant's right to privacy is respected and that his life is not endangered by the disclosure.

[38] I do not accept the Minister's argument that the Board turned its mind to irrelevant and extraneous considerations and thus committed a reviewable error. The decision is justified and intelligible. I see no reason for this Court to intervene.

[39] The Respondent submitted that the Minister's vacation application constituted an abuse of process. I do not feel the need to comment on these submissions, other than to say that vacation applications should not be used as a more convenient timeline within which to challenge the veracity of documents that are internal to a claimant's refugee determination process. That asking for an adjournment would pose scheduling inconveniences for the Minister is not a valid rebuttal to this point.

VI. Conclusion

[40] Submissions were received with respect to possible questions for certification but given my findings with respect to this matter, I have decided that it would not be appropriate to certify any questions.

[41] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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