

Federal Court



Cour fédérale

Date: 20120706

Docket: IMM-8585-11

Citation: 2012 FC 862

Ottawa, Ontario, July 6, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YAN PING KE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant filed a claim for protection in Canada, asserting that she is a citizen of China and fears persecution because she is a Roman Catholic Christian. Her claim was denied by the Refugee Protection Division of the Immigration and Refugee Board on the basis that she had failed to establish her personal identity. The Board further held that even if she had established her identity, she was not at risk of persecution in China. The applicant challenges both of those findings.

BACKGROUND AND APPLICANT'S NARRATIVE

[2] In November 2008, the applicant's father died, which caused her to become depressed. Her mother told her about Christianity in March 2009 and took her to an underground Catholic church. The applicant continued to attend the underground church until June 7, 2009, when she says it was raided by agents of the Public Security Bureau (PSB).

[3] On the day of the raid, one of two lookouts telephoned the church leader and told him the PSB agents were approaching from the front of the building. The leader told the members to leave the church by the back door. The applicant and her mother escaped and went to a relative's home to hide. While in hiding, the applicant learned the PSB had searched her home. After learning that some of the other church members were arrested, the applicant's family decided she should leave China. She paid a smuggler to bring her to Canada and arrived on August 22, 2009. She claimed refugee protection on September 29, 2009.

[4] By letter of October 14, 2010, the applicant was asked to present her original Chinese Resident Identity Card (RIC) to the Board "as identity is an important issue in your claim to refugee protection." The applicant submitted a RIC she said was issued to her in 2003 and a second RIC issued to her in 2006. She also provided the Board with a Household Registration Card (Hukou) issued to her in 2008.

[5] When the applicant claimed protection, Citizenship and Immigration Canada (CIC) photographed her (CIC Photograph). Some time before the hearing, a tribunal officer prepared a document (Comparison Page), attached as Annex A, containing an enlargement of the CIC

Photograph next to an enlargement of the photograph from the 2006 RIC. The Comparison Page contained a notation made by the tribunal officer which read: "Photo May Be An Issue." The Board did not provide the Comparison Page to the applicant until the first day of the hearing.

[6] The Board heard the applicant's claim for protection over three sittings. At the first sitting, on February 14, 2011, the Board stated the applicant's personal identity was at issue. The following exchange between the applicant's counsel and the Board took place:

Counsel: Just to confirm you do have Ms. Ke's resident identity card; is that correct?

Board: Yes.

Counsel: And I am assuming there were no issues raised with that. I did not hear otherwise.

Board: Okay...

Counsel: Nothing was highlighted is what I am asking.

Board: Nothing on its surface but I will be questioning on it.

Counsel: That is fine; I just want to know if there was anything I needed to be made aware of.

Board: So we will begin with your identity. And then potentially based on those questions we will determine whether I continue on the basis of your claim or stop there.

[7] Later on, the Board stated that it had the applicant's RIC and CIC Photographs before it and the applicant and her counsel were made aware of the Comparison Page. The Board asked the applicant several questions about her appearance. She answered them, and the following exchange

between applicant's counsel and the Board Member took place in reference to the Comparison

Page:

Counsel: Excuse me Mr. Member, the... are these your notes or is this Citizenship and Immigration Canada's notes?

Board: This is actually the Board's notes.

Counsel: Well I... but is this... is this after review of the card? Because I asked at the beginning if there were any issues that were raised.

Board: Not with the card but with the... I said I would explore the...

Counsel: Yes, but I asked specifically if there was [sic] any issues with respect [to] the card, the authenticity of the card.

Board: Just with the card. So I do not know if it is an authentic card and she is not that person or not, so I was not going to say because I have not even explored it.

Counsel: No but I asked specifically...

Board: Right, I was not going to say there was an issue.

Counsel: Well, there is; it says here photograph may be in issue. So I asked you if there was any issue at the commencement of this hearing.

Board: With the card.

Counsel: Yes, this is the resident identity card.

Board: Yes. There may not be an issue with the card; there may be an issue with this photograph and the card. So I was not prepared to talk...

Counsel: Okay now with all due respect you are splitting hairs because it is the issue and the card.

Board: No I was not... no because I was not prepared to talk about the authenticity of the card until I received her testimony. It could have... it could have all been...

[8] Counsel submitted she should have been informed about the Comparison Page. She submitted as well that the applicant's claim should be heard by a new panel because the Board violated the applicant's right to procedural fairness when it said there was no issue with respect to the RIC, then questioned her about it. In light of counsel's concerns, the Board recessed the hearing. Following the recess, counsel requested an adjournment to consider what to do about the Comparison Page and the identity issue. The Board granted the adjournment.

[9] Before the second sitting, the applicant wrote to the Board asking for a *de novo* hearing into her claim. She said the Board had breached her client's right to procedural fairness and there was an apprehension of bias, as shown by the Board's failure to disclose the Comparison Page. Further, it was submitted that the Board was no longer a neutral party in the proceeding but had become the applicant's adversary.

[10] At the second sitting on June 6, 2011, the Board rejected the applicant's request for a *de novo* hearing. An oral decision was rendered and a formal written decision followed. The Board heard additional evidence and submissions with respect to the applicant's identity, and then adjourned the hearing.

[11] After the second sitting, the Board sent the 2006 RIC and the Hukou to the RCMP Forensic Laboratory for forensic analysis. This was done with the agreement and consent of the applicant. The RCMP stated that the authenticity of these documents was inconclusive because there were no genuine specimens for comparison. The RCMP also said the 2006 RIC was well printed, had good quality security elements, and bore no signs of alteration.

[12] At the third sitting on October 17, 2011, the Board heard the applicant's submissions on the RCMP report. It also heard her testimony and submissions on the merits of her claim. After the third sitting, the Board considered the applicant's claim and rejected it. The following summarizes the Board's various decisions and findings.

Motion For *De Novo* Hearing

[13] The Board reproduced its oral reasons for denying the applicant's request for a *de novo* hearing in its written decision. It rejected the applicant's motion, finding that there was no breach of procedural fairness for the following reasons. The applicant was advised that identity was at issue by the screening form which was provided to her before the hearing. She also had both photographs the Board looked at on the Comparison Page. Although counsel had asked if there was an issue with the RIC and the Board said there was not, no breach of procedural fairness resulted from this exchange. When it said there was no issue, the Board meant there was no concern about the authenticity of the RIC. The questions at the hearing were directed at establishing whether the applicant was actually the person in the photograph on the RIC. Further, the adjournment between the first and second sittings allowed the applicant to gather additional identity documents and prepare to address the issues raised at the first sitting.

[14] The Board rejected the applicant's allegation of bias. It stated that it had not personally prepared the Comparison Page and had no preconceived ideas about the case. Applying the test set out in *Committee for Justice and Liberty et al v National Energy Board* [1978] 1 SCR 369, the Board found that an informed person, viewing the matter realistically and practically, and having thought the matter through, would not conclude it was more likely than not that the Board would consciously or unconsciously decide the matter unfairly.

Identity

[15] The Board found the applicant was not a Convention refugee or person in need of protection because she had not established her identity. It found she was a citizen of China, based on her oral testimony, but she had not established her personal identity. She did not resemble the photograph in her RIC and her testimony about her other identity documents was inconsistent with the documents themselves and with other documentary evidence before the Board.

[16] The Board's concerns about the applicant's appearance included the absence of a mole on her right cheek in the RIC photograph, whereas the CIC photograph showed she had such a mole. CIC's port of entry notes also noted a mole on the right cheek. The Board rejected the applicant's explanation that the mole had appeared after the RIC photograph was taken.

[17] The Board also noted the shape of the applicant's eyelids differed in the two pictures as did the length of her face. The applicant stated that her eyes had always been the same and her face was longer because she had gained weight. The Board found gaining weight would make the face

wider, not longer, and rejected the applicant's explanation. The differences between the RIC and CIC photographs were significant and led the Board to conclude the person in the RIC photograph was not the applicant.

[18] A graduation certificate the applicant had submitted did not assist her in establishing her identity. The Board noted the page containing the applicant's personal information had been detached, so it could not conclude the contents of the certificate were originally attached to this page. Although the applicant could speak Putian – a regional dialect specific to Fujian Province – this did not confirm the applicant's personal identity. This only established that she was from Fujian Province, not that she was who she said. Further, several photographs the applicant had submitted did not establish her identity. The Board found they could be photos of the applicant and still not be photos of the person described in her PIF.

[19] The applicant testified that her friend brought her the graduation certificate and photos, but the Board found there was no evidence from the friend on how or when she brought these documents to Canada. The applicant's failure to provide evidence about how she got them led the Board to draw a negative inference.

[20] The Board found the applicant had not met the onus to provide sufficient credible or trustworthy evidence to establish her identity, so her claim for protection could not succeed. However, in the alternative to its identity finding, the Board considered the merits of the applicant's claim.

Credibility

[21] The applicant's oral testimony and the documentary evidence before the Board were inconsistent. On this basis, the Board concluded the applicant had not provided sufficient credible and trustworthy evidence that she was wanted in China.

[22] The Board found the applicant's actions were inconsistent with her fear the PSB was looking for her and that she was at risk because she is a Christian. She testified that she had documents with her name and address, as well as her aunt's name and address sent to her by mail. She had testified that the PSB was looking for her when she had the documents sent to her. A report from the United States Department of State showed that Chinese authorities monitor mail. CIC's Response to Information Request (RIR) CHN103133.E indicated that the authorities are able to track fugitives.

[23] By having mail sent to herself while the PSB was looking for her, the applicant put her mother and aunt at risk for assisting a fugitive. She also risked having her identity documents confiscated by the Chinese authorities, which would have weakened her claim for protection. Having been assisted by an immigration consultant and a lawyer, it was not reasonable for the applicant not to have found a way to get her documents without putting her family at risk. The applicant had also put her friend at risk by asking her to bring documents from China. These actions were inconsistent with her stated fear of the PSB, so the Board found she was not credible.

[24] The Board also found the applicant was not credible because she had not provided a copy of a summons or arrest warrant to prove the PSB was looking for her. She testified that the PSB

showed a summons when they went to her house in 2009; however this detail was omitted from her PIF. The Board rejected her explanation for the omission that she did not know she had to provide much detail, because the applicant had given details about the search and the allegations against her.

[25] Although other evidence before the Board showed use of summonses is not consistent in China, RIR CHN42444.E showed that duplicate summonses are provided to family members or neighbours when the PSB cannot locate a person whom they seek. The applicant had testified that her grandparents lived next to her and that the PSB had not left a duplicate copy of a summons with them. The PSB's failure to leave a summons with the grandparents, in the face of established procedure to leave one, showed, in the Board's view, that the applicant was not credible.

[26] Finally, the applicant's story of a raid on her church in 2009 was not credible because it was inconsistent with the documentary evidence showing the risk to Christians in Fujian Province was low.

Risk in Fujian Province

[27] The Board found the applicant is a genuine Catholic, but found she did not face a risk of persecution in Fujian Province.

[28] A report from the United Kingdom Home Office showed that unregistered religious groups face punitive and coercive state action. The same report showed the Chinese government permits proselytising in registered places of worship and in private, but forbids proselytising in public. RIR CHN102492.E showed that treatment of house churches varies by region. With respect to Fujian Province, the information before the Board was mixed. The president of the Cardinal Kung

Foundation said that Fujian Province was one of the worst provinces for persecution of Catholics. The Board found that this statement was not backed up by specific examples. The Executive Secretary of the Hong Kong Christian Council indicated that authorities in Fujian Province had allowed non-official Catholic bishops to practice openly. In addition, a report from the China Aid Association said that church leaders and members sometimes experienced severe punishment. However, RIR CHN103500.E showed that there is reduced hostility toward Christianity in China and that reports of persecution are the exception, rather than the rule. Additional documents before the Board provided a mixed view of persecution of Christians in China. The Board found that, if there had been any arrests or persecution of underground Catholic Church members, they would have been documented. There were no documented arrests, so the Board concluded the authorities in Fujian Province are not interested in persecuting regular underground church members.

[29] The applicant testified that, if she returned to Fujian Province, she would not be able to pray, sing, or spread Christianity. The Board found that the applicant's proselytising efforts in China were modest and that her efforts to spread Christianity would not be limited if she returned to Fujian Province. It also found she was a regular member of an underground church. Only those who were leaders or high-profile members were at risk of persecution, so the applicant would be able to practice Christianity as she saw fit.

Conclusion

[30] The Board denied the applicant's claim because she had not established her personal identity. Even if she had done so, the Board found she was not at risk of persecution in China. Further, there was no credible basis for her claim, so the Board concluded that the applicant is neither a Convention refugee nor person in need of protection.

Issues

[31] In her memorandum of fact and law the applicant raises four issues:

1. Whether the Board breached her right to procedural fairness;
2. Whether the Board was biased;
3. Whether the Board's risk-finding was reasonable; and
4. Whether the Board applied an inappropriate test for persecution.

[32] The first two issues are issues of procedural fairness and were the focus of the applicant's oral submissions. I will deal with those together.

[33] The parties agree that the standard of review with respect to any breach of procedural fairness is correctness. I agree. An allegation that the Board failed to disclose a document or an allegation that it failed to raise an issue both impact an applicant's opportunity to respond. In *Worthington v Canada (Minister of Citizenship and Immigration)*, 2008 FC 626, at paras 42 to 45, Justice O'Keefe held that this issue is reviewable on the correctness standard. The Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404, at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty."

[34] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada approved the following test for bias, first articulated in *Committee for Justice and Liberty*, above, page 394:

[...] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is “what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

[35] Whether there is an apprehension of bias is a question of fact within the jurisdiction of the reviewing Court, and no deference is owed to the Board: *Luzbet v Canada (Minister of Citizenship and Immigration)*, 2011 FC 923, at para 5.

[36] Accordingly, the procedural fairness issues will be reviewed on the correctness standard with no deference showed to the Board’s decisions. The remaining issues are reviewable on the reasonableness standard and deference is owed to the Board.

ANALYSIS

1. Did the Board Breach The Applicant’s Right To Procedural Fairness?

[37] The applicant submits that the Board breached her right to procedural fairness when it failed to disclose the Comparison Page before the hearing and did not inform her that the RIC was in issue. She points to the initial exchange with the Board Member who, when asked, told her that there were no issues with respect to the RIC, but then proceeded to question her about it. She

submits that the Board was under a duty to clearly inform her of this issue so she could know the case against her and prepare her response.

[38] The applicant further submits that the adjournment, which was only granted after she objected to the way the Board was proceeding, was not enough to cure the breach of procedural fairness. The Board's failure to disclose the Comparison Page, she submits, shows it was biased against her, and that she is therefore entitled to a new hearing.

[39] The respondent does not admit that there was a breach but takes the position that, while it may have been better for the Board to disclose the Comparison Page before the hearing, any breach of procedural fairness arising from the non-disclosure was minimal and was cured by the adjournment. It is further submitted that the allegation of bias is based on pure speculation and is not enough to rebut the presumption of impartiality. The applicant, it is submitted, has not demonstrated a real likelihood of bias.

[40] Subsection 29(2) of the *Refugee Protection Division Rules*, SOR/2002-228, provides that "If the division wants to use a document at a hearing, the Division must provide a copy to each party." There is a similar obligation on a party that wishes to use a document. It is of interest to note that section 30 of the *Rules* provides that if a party fails to comply with the disclosure requirements in section 29, then it may not use the document at the hearing unless allowed by the Division. In deciding whether to allow the document to be used, the Division is required to consider "any relevant factors" including "(a) the document's relevance and probative value; (b) any new evidence it brings to the hearing; and (c) whether the party, with reasonable effort, could have provided the

document as required by rule 29.” There is no parallel provision prohibiting the Division from using a document that it has failed to disclose. Accordingly, the consequences of that failure falls to be decided under the common law principles of a duty of fairness and natural justice.

[41] In a very technical sense the Board could be said to be using the Comparison Page at the hearing; however it was little more than a composite of photographs already in the Board’s file and which were provided to the applicant. All the Comparison Page did was put them side-by-side and draw the Board’s attention to the apparent difference between the photographs and the applicant was notified prior to the hearing that her identity was in issue.

[42] I am unable to find that the Board in its initial response mislead counsel. The statement of counsel was the following: “I am assuming there were no issues raised with that [emphasis added].” This is different that asking whether any issues were raised by it. The former, in my view, reasonably asks whether there are issues concerning the genuineness of the RIC and that is how the Member understood the question. In any event the Member made it very clear to the applicant and her counsel that identity was an issue and that he would be asking questions “on” the RIC. The Member did just that when he asked questions to address the differences he identified between the applicant’s physical appearance, the RIC image, and the CIC Photograph.

[43] In any event, after the issue about the photographs was raised at the first sitting, the Board then provided an adjournment of nearly four months, which was sufficient to cure any prejudice from the late disclosure. In the criminal law context, where procedural safeguards are higher than in the immigration context, fulsome disclosure and an adjournment are the proper remedy for this kind

of error: See *R v Bjelland*, 2009 SCC 38, at paragraphs 37 and 38. This Court has also held that an appropriate response to delayed or limited disclosure is full disclosure and an adjournment: See *Mendez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1150.

[44] Section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 directs the Board to take into account documents establishing a claimant's identity. It would have been an error for the Board not to consider both of the photographs before it. The Board remedied any mistake in failing to provide the Comparison Page and there was no breach of procedural fairness.

[45] I agree with the respondent that the applicant's bias allegation is based upon pure speculation and is not enough to rebut the presumption of impartiality. The applicant has not demonstrated a real likelihood of bias, or a reasonable apprehension of it.

2. Was the Board's Risk-finding Reasonable?

[46] It is submitted that the Board drew a speculative conclusion from the fact the applicant had documents mailed to her. The applicant says that although there was evidence the authorities in China monitored mail, there was no evidence that postal officials had access to the government database on wanted criminals. The people handling the mail would not be aware the applicant was wanted by the PSB. Accordingly, it is submitted that the finding that the PSB was not after her was based on this speculative conclusion, and is unreasonable.

[47] Further, the applicant submits that the Board drew an unreasonable conclusion from her statement the PSB did not leave a summons with her grandparents. The evidence before the Board

was that PSB practice with respect to summonses is variable and the PSB does not always follow the law to the letter. It was an error for the Board to conclude the PSB would have left a summons, when the documentary evidence showed only that they could leave a summons. The applicant asserts that her story was consistent with the documentary evidence before the Board. She says that the Board failed to address important evidence which contradicted its conclusions, so the decision must be returned for reconsideration.

[48] Given the Board's reasonable finding that the applicant had not established her identity, the reasonableness of the risk-finding cannot affect the outcome. However, I have concluded that the risk-finding was reasonable. I agree with and adopt the submissions of the respondent.

[49] The Board reasonably concluded that it was unreasonable for the applicant to have documents mailed to her in her own name when she was a wanted fugitive. This Court has upheld similar findings in the past: See *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1235, at paragraphs 19 and 69. The documentary evidence showed the authorities in China monitor mail, so it was reasonable for the Board to conclude the applicant's actions were inconsistent with the risk she said she faced. The Board acknowledged that the evidence before it with respect to summonses was mixed. However, the Board was entitled to weigh the evidence and prefer some reports over others.

3. Did The Board Err In Its Interpretation Of Persecution?

[50] The applicant submits that the Board applied a threshold for persecution which was too high, when it found that she was not at risk because she did not face arrest or detention. *Fosu v*

Canada (Minister of Employment and Immigration), [1994] FCJ No 1813, establishes that persecution can include prohibitions on worshipping in public or in private. The applicant submits that the standard the Board should have applied was whether she could practice Christianity in China openly and freely; had it done so, it would have concluded that she actually faces a risk of persecution in China.

[51] The submissions made by the applicant have been raised before. Chief Justice Lutfy had this to say with respect to a similar argument in *Lin v Canada (Minister of Citizenship and Immigration)* 2005 FC 960, at paragraph 11:

The applicant relies on the principle that freedom of religion also includes the freedom to demonstrate one's religion in public and that any prohibition against the public expression of one's religious beliefs can constitute persecution: *Fosu v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1813 (QL) (T.D.); *Husseini v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 235, 2002 FCT 177; and *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*, 2003 HCA 71, a decision of the High Court of Australia. In my view, it was open to the immigration officer to conclude that there was an insufficient factual underpinning in this case to support the application of the principle relied upon by the applicant. As I understand the immigration officer's decision, he was not satisfied that the applicant's personal circumstances met the threshold referred to in the documentary evidence concerning the risks faced by underground or overt practising Roman Catholics in Fujian province.

[52] The applicant here testified that she wanted to spread Christianity, and the evidence before the Board was that spreading Christianity in homes and private places of worship is not forbidden in Fujian Province. Even if the Court may have come to a different conclusion, it was not unreasonable for the Board to conclude, as it did, that the applicant, if returned to Fujian Province, could practise her religion as she appears to want to practise it.

CONCLUSION

[53] For these reasons this application is dismissed. There was no breach of natural justice or procedural fairness. The Board's decision was reasonable. I would add that based on my examination of the two photos on the Comparison Page, a conclusion that they were of the same person, may well have been held to have been unreasonable.

[54] No question was proposed for certification by either party.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified.

“Russel W. Zinn”

Judge

Citation : 2012 FC 862

Annex A to Reasons for Judgment and Judgment

87 年 8 月 4 日
 This is Exhibit referred to in the affidavit of Diane Coulthard sworn before me, this 20th day of December 2011

Stacey Diding
 A COMMISSIONER FOR TAKING AFFIDAVITS

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建省莆田市城厢区灵川柯朱村柯朱120号

号码 350301198708140447



3000 Dec 31, 2006 - (Ric)

ZENSHIP AND IMMIGRATION CANADA

FORMULAIRE ÉTABLI PAR LE MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION LE PRÉSENT DOCUMENT EST LA PROPRIÉTÉ DU GOUVERNEMENT DU CANADA

PARTIE 1



Immigration Canada
 29 SE 2009
 (element) 63

Canada

PHOTO MAY BE AN ISSUE

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8585-11

STYLE OF CAUSE: YAN PING KE v. THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 20, 2012

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

DATED: July 6, 2012

APPEARANCES:

Shelley Levine FOR THE APPLICANT

Christopher Ezrin FOR THE RESPONDENT

SOLICITORS OF RECORD:

LEVINE ASSOCIATES FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario