Federal Court  Cour fédérale

Date: 20130411

Docket: IMM-1807-12

Citation: 2013 FC 362

Montréal, Quebec, April 11, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LE HE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Le He (the Applicant) seeks judicial review of the decision of Daniel G. McSweeney (the Officer), a member of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated January 25, 2012, and signed February 1, 2012. In his decision, the Officer determined that the Applicant is neither a Convention refugee nor a person in need of protection. The Applicant seeks an order quashing the Board's decision and remitting the matter back for re-determination by a differently constituted panel.

[2] The Applicant is a citizen of the People's Republic of China (PRC) who claims to have a well-founded fear of persecution in China at the hands of the Public Security Bureau (PSB) due to his Christian religion and membership in an underground church in the Fujian province. The Board found that there was insufficient evidence to support the Applicant's allegations that his house church was raided or that the PSB was looking for him. The Board also found that the documentary evidence did not support an argument that the Applicant would be at risk of persecution in the Fujian province.

[3] For the reasons set out below, I find that the Officer's decision was reasonable and the application should be dismissed.

Facts

[4] The Applicant was born in China on December 26, 1989. He is a Chinese citizen from the Fujian province who began attending an underground Protestant house church in China on June 1, 2008. He continued to attend church over the next few months and claims to have been baptized in China on December 25, 2008.

[5] The Applicant came to Canada on a student visa on May 30, 2009 and, according to a letter from Reverend David Ko dated July 24, 2011, joined the Living Stone Assembly on June 7, 2009. As the Applicant had no baptismal certificate, he was baptized for a second time on September 19, 2009, at the recommendation of Reverend Ko.

[6] The Applicant alleges that his house church in China was raided on November 15, 2009. He learned of the raid the next day from his parents. On November 20, 2009, the PSB visited the Applicant's parents' home looking for him. When informed the Applicant was studying abroad, the PSB allegedly asked that he report to them upon his return to China. The PSB visited again on December 18, 2009 with a similar message.

[7] The Applicant submitted a claim for refugee protection only a few days after the first alleged visit, on November 23, 2009.

[8] The PSB allegedly came to the Applicant's home with an arrest warrant on February 23, 2010. His parents informed him of this visit at the end of February. In total, the Applicant's parents advised him that the PSB had visited their home up to 7 times by the time of the interview, only showing the arrest warrant to the parents and never leaving a copy.

[9] The Applicant states that the organizer of his house church and another member were arrested after the raid and each sentenced on May 20, 2010, to more than two years in prison.

[10] A hearing scheduled for August 19, 2011 was adjourned due to the Applicant's illness. On November 4, 2011, a second hearing was adjourned to permit the Applicant to seek counsel after his initial counsel withdrew due to a perceived conflict of interest. A full hearing before the Board took place on December 20, 2011 and the Board issued reasons rejecting the claim on January 25, 2012.

Decision under review

[11] The Officer found, on a balance of probabilities, that the Applicant is not a Convention refugee or a person in need of protection. The Officer based this finding on his conclusion that the Applicant is not a wanted person in China and that, given the lack of evidence of persecution of Protestant church members after 2006, the authorities in Fujian are not interested in persecuting underground Protestant church members. The Officer held that the Applicant's fear of persecution upon return to China is not well-founded and that he will be "free to worship as he sees fit". As a result, he concludes that the Applicant would not face a serious possibility of persecution should he return to China, nor would he be personally subject to a risk to his life, or a risk of cruel or unusual treatment or punishment, or a danger, believed on substantial grounds to exist, of torture.

[12] In arriving at this conclusion, the Officer broke down his analysis as follows:

i) **Credibility of being wanted in China:** The Officer refused the Applicant's claim that his church in China was raided and that he is wanted by the PSB, finding these allegations not credible. In particular, the Officer found, in light of the documentary evidence, that it was unreasonable that the PSB would not have left a document with the Applicant's parents if they had repeatedly returned to the Applicant's home. In addition, he found the Applicant's failure to provide a letter or affidavit from a friend or family member attesting to the facts to be unreasonable. Finally, given the lack of such a letter or affidavit and in light of an analysis of all the documentary evidence, the Officer found that officials in Fujian are not interested in persecuting underground Protestant Christians and have not engaged in raids and arrests in that region, as

discussed in relation to the Applicant's ability to return to China and practice in Fujian.

ii) **Ability to return and practice in Fujian**: Based on a review of the documentary evidence, counsel's submissions, and a survey of the recent jurisprudence of the Federal Court, the Officer was not persuaded that underground Christians face a serious possibility of persecution in Fujian. In a lengthy review of the documentary evidence, the Officer noted only three incidents involving persecution or policing of underground churches in Fujian province since 2006. Contrasting this with much more specific evidence of persecution in other provinces and regions of China, particularly "given that authorities have the legal framework and resources to persecute underground Protestants if they wish" (Decision, para 25), he found that it would be reasonable to expect some form of additional objective documentary evidence to exist were local authorities in Fujian interested in persecuting underground Protestant Christians. He found that there is a large discrepancy in the treatment of house churches in China by region or local conditions, that house churches throughout China are mostly tolerated (grudgingly) if below a certain size (about 25 people), that persecution is an exception rather than the rule, that there is no pattern of persecution in Fujian, and that he is not satisfied that persecution is occurring for groups as small as the Applicant's (approximately 10 members).

iii) **Ability to return and spread the gospel in Fujian**: The Applicant further alleged that he has spread the gospel in Canada and could not do this in China. The Officer concluded, however, that the Applicant could "return to Fujian and worship as he sees fit", finding that the Applicant's gospel-spreading activities in Canada were modest at

best (for example, they were directed at only two people, were unmentioned by Reverend Ko in his list of the Applicant's Christian activities in Canada, and the Applicant was unable to indicate where in the Bible Christians were commanded by Jesus to spread the Gospel) and that there was no additional evidence regarding this claim.

Issues

[13] The Applicant raises the following two issues: (i) Did the Board misconstrue the evidence regarding the issuance of summonses/warrants in China; and (ii) Did the Board err in finding that the Applicant can return to China and freely practice Christianity in Fujian province?

[14] While these two issues overlap, I will nevertheless address them separately below.

Analysis

[15] The Applicant does not address the standard of review in relation to his first issue and suggests that the second issue is reviewable on a reasonableness standard. The Respondent submits that the reasonableness standard applies to the decision as a whole.

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 57, established that where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, a reviewing court may adopt the settled standard of review. In *Qin v Canada (MCI)*, 2012 FC 9 at paras 33-37, Justice Russell established that a reasonableness standard applies both to credibility findings and to mixed

questions of fact and law as to whether or not specific acts of discrimination amount to persecution. The same standards apply here. Plausibility determinations or the Board's analysis of the evidence are questions of fact or mixed fact and law and also reviewable on a standard of reasonableness (*Zhan v Canada (MCI)*, 2011 FC 654 at para 17).

[17] When reviewing a decision for reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47; *Khosa v Canada (MCI)*, 2009 SCC 12, [2009] 1 SCR 339 at para 59).

i) Did the Board misconstrue the evidence regarding the issuance of summonses/warrants in China?

[18] The Applicant argues that the Board erred in finding, without any evidentiary basis, that a summons/warrant would have been left with the Applicant's family if he was wanted by the PSB. Identifying the question as a central element of the Officer's assessment of the Applicant's credibility, the Applicant submits that an error in this regard is, in and of itself, determinative and a sufficient ground for review.

[19] More particularly, the Applicant takes issue with the Officer's statement that "…the documentary evidence indicates that a person who is summoned for arrest or a family member or neighbour is provided with a duplicate copy of the summons" (Decision, para 7). He argues that the sole piece of documentary evidence relied upon in this regard (a Response to Information Request

dated June 1, 2004) is out of date and not supportive of the Officer's finding. The Applicant points instead to a more recent Response to Information Request of July 6, 2012, according to which there is great variability and arbitrariness in law enforcement procedures in China and the proper procedure is *not* to leave a summons/warrant with family members.

[20] I agree with the Respondent that the Applicant is estopped from contesting the relevancy and currency of the document relied upon by the Officer with respect to the procedure for issuing summonses/warrants in China, as counsel for the Applicant referred the Officer to this very document in his submissions, expressing no reservations as to its currency.

[21] That being said, I agree with the Applicant that the Officer appears to have overlooked other statements in the 2004 document that could support his claim. The document clearly indicates that the issuance of summons to family members is not proper procedure, that there is great variability and arbitrariness in law enforcement procedures in China, and that the PSB has yet to become a rule of law institution. This conclusion is indeed supported by the information contained in the more recent 2012 Response to Information Request, according to which "arrest procedures differ from locale to locale, having to conform to local customs reflecting indigenous circumstances and […] even the targeted individual may not receive a copy of the summons without specifically asking for it." The Officer's conclusions and his failure to address this document, therefore, raise questions as to whether he has fully engaged with this more recent evidence.

[22] Had the Officer's credibility conclusion been based solely on his finding that the PSB would leave a document with the Applicant's parents, it would most probably be reviewable. However,

this is not the case here. While awkwardly worded, the Officer's reasons suggest that he was simply seeking some form of corroborating evidence for the Applicant's claim, whether a copy of a summons, a letter or affidavit from friends or family, or supportive documentary evidence in the country package, and that these forms of evidence would not all be required but could be presented in the alternative.

[23] The burden of proof is ultimately on the Applicant, such that it was not unreasonable for the Officer to require him to provide some form of corroborating evidence of his claims regarding the church raid and his wanted status. In *He v Canada (MCI)*, 2010 FC 525 at para 14, Justice Near dismissed an argument similar to that of the Applicant, holding as follows:

> The Board based its decision on documentary evidence that in many cases warrants or summons are normally left. It was up to the Applicant to introduce into evidence all the material to establish that her claim was well-founded and a lack of relevant documents can be a valid consideration for the purpose of assessing credibility (see *Syed v Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 357, 78 A.C.W.S.(3d) 579 (Fed. T.D.), see also *Sun v Canada (Minister of Citizenship & Immigration)*, 2008 FC 1255, [2008] F.C.J. No. 1570 (F.C.)). In this case the Board's decision was reasonably open to it.

[24] As in that case, it was open to the Officer here to require further evidence supporting the Applicant's allegations of his wanted status. As stated by Justice Zinn in *Yu v Canada (MCI)*, 2010 FC 310 at para 28:

> A fact finder, when presented only with the oral testimony of a witness, may find that witness generally not to be credible. If so, then his evidence will be given little, if any, weight. The fact finder will want to see or hear other evidence that supports a "fact" testified to by such a witness, before finding that it is a fact. In short, where the only evidence of a fact is a statement of a witness who has been found not to be credible,

> it is open to the fact finder to say that the fact has not been proven on a balance of probabilities. (…)

[25] In the case at bar, it must be remembered that the Applicant was not in China during the alleged raid. Moreover, the Officer found that there was very little evidence that small groups of underground practising Christians would suffer persecution in the Fujian province. Given those circumstances, the Officer was entitled to question the Applicant's credibility and to require some corroborative evidence. Once again, the Board's main finding was not that a summons was not produced, but that the Applicant had no proof from China that he was wanted or that his church was raided.

[26] Not only was there no corroborative evidence, but no attempt to obtain such evidence was made. The Applicant does not address the statement in the 2010 Response to Information Request to the effect that "[i]t is possible to obtain a copy [of an arrest or summons] afterwards by contacting the local Public Security Bureau and making this request". In *Wei v Canada (MCI)*, 2012 FC 911, Justice Russell drew a negative inference from the Applicant's failure to produce a copy of an alleged PSB warrant, referencing the earlier 2004 Response to Information Request for the proposition that it is possible to obtain a copy from the PSB. In the absence of any allegation that it would have been unreasonable for the Applicant's family to contact the PSB, the same negative inference can be drawn here.

[27] In light of the foregoing, I am of the view that the Officer's credibility finding is entitled to deference and is not unreasonable, despite the fact that he may have been mistaken in assuming that the PSB would have left a copy of the summons/warrant with the Applicant's parents.

ii) Did the Board err in finding that the Applicant can return to China and freely practice Christianity in Fujian province?

[28] The Applicant submits that the Board's conclusion that the Applicant can return to Fujian province and freely practice his religion without a serious possibility of facing persecution for doing so is unreasonable.

[29] He argues that this determination was based on an alleged lack of evidence documenting arrests of Christians in Fujian province and points to two recent Federal Court decisions (*Weng v Canada (MCI)*, 2011 FC 1483 [*Weng*] and *Liang v Canada (MCI)*, 2011 FC 65 [*Liang*]) as supportive of his position, as they both pertain to the Fujian region.

[30] The Applicant argues that the evidence before the Board in *Weng* was exactly the same as that before the Officer in this case, including two letters from Bob Fu, President of the China Aid Association. With respect to *Liang*, the Applicant argues that Justice Shore's finding that "[g]iven the evidence of the destruction of houses of worship in the Fujian province, the Applicant does have substantial grounds to fear persecution if she chooses to freely exercise her right to freely practice her religion" (para 18) is directly applicable with respect to the existence of persecution in the Fujian province.

[31] The Applicant also argues that the country documentation before the Board clearly established that unregistered churches in China are illegal and that sanctions may result from

membership therein. He cites Mr. Fu's evidence that "it is absolutely incorrect to find that there is religious freedom in Fujian province" and that persecution in Fujian is "always present".

[32] Counsel for the Applicant further argues that the Officer erred by suggesting that the Applicant would not face persecution because of the size and underground nature of his church. Counsel argues that the Officer has no way of knowing that the Applicant would join a church sufficiently small to avoid detection or that, once he had chosen a church, that church wouldn't grow. It is argued that restricting the Applicant to membership in a small house church limits his freedom of religion, an issue also addressed by Justice Shore in *Liang* (at para 22). Counsel claims that in light of that decision, it was unreasonable for the Board to rely in any measure on the size of the Applicant's group to find that he does not have good grounds to fear persecution.

[33] Counsel also argues that the Board erred in focusing on raids and arrests as the principal barometer of religious persecution in Fujian, as these are but one aspect of persecution and thus constitute an unduly limited understanding of freedom of religion. Counsel argues that the extent to which underground Christians are able to hide their activities and avoid detection is irrelevant for the purposes of determining whether or not they are subject to persecution or are unable to freely practice their religion, openly and in accordance with their fundamental beliefs.

[34] Finally, counsel for the Applicant argues that the Board erred by considering the treatment of Christians in Fujian in a vacuum, and that it should have considered systemic sanctions in China against those who practice unauthorized religions as opposed to the chances of the Applicant

himself being singled out when assessing the objective component of the Applicant's well-founded fear of persecution.

[35] I find that the Applicant cannot succeed on any of these arguments for the following reasons.

[36] First of all, it is trite law that each case turns on its own facts. As Justice Campbell stated in *Chen v Canada (MCI)*, 2012 FC 545, at para 22, "[b]ecause current evidence is so crucial to support a finding of safety upon return, in my opinion a determination on evidence in a past decision of the Court has no precedential value"; see also *Yu v Canada (MCI)*, 2010 FC 310, at para 22.

[37] Moreover, the *Weng* decision can easily be distinguished from the case at bar. In that case, the Court's finding that the Board's decision was unreasonable was not based solely on the likelihood of persecution in Fujian, but rather primarily on its finding that the Board arrived at a conclusion regarding the claimant's credibility after a simple recital of the facts and testimony without analysis or reasons. As a result, the Court's finding that the Board erred in failing to take into consideration relevant evidence of arrests and other forms of persecution of house church members in the province of Fujian was just one element of its decision and would not necessarily have been sufficient on its own to justify overturning the Board's decision.

[38] As for *Liang*, it is true that Justice Shore found that it was unreasonable for the Board to rely on the size of the applicant's congregation to establish persecution and that authorities raid churches regardless of their size. However, as pointed out by the Officer, that finding has not been

uniformly followed by other members of this Court, and *Liang* has indeed been distinguished in at least four decisions to date: see *Lin v Canada (MCI)*, 2012 FC 1200; *Wei v Canada (MCI)*, 2012 FC 911; *He v Canada (MCI)*, 2011 FC 1199; and *Yang v Canada (MCI)*, 2011 FC 811 [*Yang*].

[39] Having carefully reviewed the evidence and the reasons of the Officer, I am of the view that it was not unreasonable to take into consideration the fact that the Applicant's church had approximately 10 members and was located in a very small village of 7 to 10 families. I am also in agreement with Justice Mactavish's finding in *Yang* that it is relevant to consider risk in relation to someone who shares a similar profile to that of an applicant. As in *Yang*, there is no evidence here that the Applicant would proselytize or assume a leadership role, thereby subjecting himself to greater risk. The Applicant himself indicates that he did not have a fear of the police or any authorities prior to leaving China (Tribunal Record, p 732). Moreover, the Officer acknowledged the existence of documents in the record that referred to the closure of house churches in Fujian province, and explained why it chose to give those documents little weight, contrary to the situation faced by the Court in *Liang*. In a nutshell, the Officer's assessment of the documentary evidence was thorough, and it is not the role of this Court to reweigh the evidence.

[40] I agree with the Applicant that he should not have to hide the practice of his religion in order to avoid persecution. However, he has not suggested other forms of persecution that he has suffered or would suffer, and the burden was on him to establish a serious risk of persecution.

[41] Finally, it was not unreasonable for the Officer to conclude that if religious persecution is prevalent in Fujian it would have been documented, given the significant amount of information

detailing very specific examples of persecution from areas of China much more remote and difficult to access than Fujian: see *Nen Mei Lin v Canada (MCI)*, (February 4, 2010), IMM-5425-08, at p 3. If an internal flight alternative can exist where the alleged persecutor is a state agent (see *Saini v Canada (MCI)*, [1993] FCJ No 280, 151 NR 239 (FCA)), it is not unreasonable to consider that the Applicant would be safe from state persecution in a particular region of China, despite abuses that may occur elsewhere in the country.

Conclusion

[42] In light of the above, I find that the Applicant has not succeeded in establishing that the Officer's decision was unreasonable, either with respect to the negative credibility findings (including the issuance of summonses/warrants in China) or with respect to the Applicant's ability to return to and practice his religion in Fujian province. As such, his application must be dismissed.

JUDGMENT

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

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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