

Federal Court



Cour fédérale

Date: 20151016

Docket: IMM-426-15

Citation: 2015 FC 1173

Ottawa, Ontario, October 16, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

HONGWEI PI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Hongwei Pi seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board dismissing his claim for refugee protection. Mr. Pi argues that the decision should be set aside because it took the Board nearly two years from the time of his refugee hearing to render its decision.

[2] A delay in rendering a decision is not a stand-alone reason to grant judicial review. It may, however, explain the factual errors that were made by the Board in this case, errors which are sufficient to make the Board's decision unreasonable. In addition, having expressly advised

the parties that it was no longer concerned about Mr. Pi's delay in claiming refugee protection in Canada, it was also unfair for the Board to then base its decision, at least in part, on that same delay.

I. Analysis

[3] Mr. Pi's refugee claim was based upon his alleged fear of persecution in China resulting from his having protested the expropriation of his restaurant business without adequate compensation having been provided to him. Mr. Pi says that the Public Security Bureau sought to arrest him after a protest, which caused him to flee the country. Mr. Pi arrived in Canada on October 31, 2010, and he claimed refugee protection on January 9, 2011.

[4] The issue of Mr. Pi's delay in claiming refugee protection was raised at his refugee hearing, where the Board Member asked Mr. Pi why he had waited over a year to make his claim. It was then pointed out that Mr. Pi had in fact made his claim approximately two months after he arrived in Canada. After this exchange, the Board reviewed the matters that were at issue in the proceeding with Mr. Pi's counsel, with the Board Member advising counsel that he was no longer concerned about the issue of delay in claiming.

[5] Mr. Pi's refugee hearing was completed on April 29, 2013, and the Board's decision was issued on January 8, 2015.

[6] The first issue that the Board dealt with in its decision was the question of subjective fear. Having expressly advised the parties that it was not concerned about the issue of delay in claiming once the length of that delay had been clarified, it was procedurally unfair for the Board

to then base its finding that Mr. Pi lacked a subjective fear of persecution entirely on his delay in claiming refugee protection in Canada.

[7] The Board's finding on this point was also based upon a factual error: that is, that Mr. Pi had waited 11 months to make his claim. As was noted earlier, Mr. Pi filed his refugee claim approximately two months after he arrived in Canada. While this shorter delay might still not be consistent with the prompt action that one would expect from someone who genuinely fears for his life, it is apparent from the transcript of the hearing that the Board did not itself view a two month delay in claiming as being material. Indeed, the Board acknowledged in its reasons "that it may be reasonable for the claimant to have taken some time and get advice about what he should do". The Board went on, however, to state that "if he were truly fearful, I do not find it reasonable for him to wait almost a year to make his claim".

[8] It thus appears that the Board would likely not have made the same finding with respect to the issue of Mr. Pi's subjective fear of persecution had it properly understood the timing of his claim.

[9] Somewhat confusingly, the Board also stated that the issue of delay in claiming "was not a decisive factor in itself", while then going on to state that the finding regarding Mr. Pi's lack of subjective fear was "reason enough for his claim to fail". The Board did, however, proceed to consider the other issues raised by Mr. Pi's claim.

[10] While the Board had a number of additional reasons for rejecting the claim, it is clear from its reasons that a number of the Board's findings were tainted by its earlier finding regarding Mr. Pi's lack of subjective fear.

[11] For example, the Board expressly stated that it found Mr. Pi not to be credible with respect to his alleged fear of persecution at the hands of the Chinese authorities “because of his lack of subjective fear”.

[12] The Board also found Mr. Pi’s story not to be credible because of the limited amount of documentary evidence that had been provided to support his claim. The Board noted that “[w]here a claimant’s story has been found to be implausible *or otherwise lacking in credibility*, a lack of documentary corroboration, or a lack of effort to obtain the documentation, can be a valid consideration for assessing credibility” [emphasis added]. As was noted in the previous paragraph, the Board’s finding that Mr. Pi’s story lacked credibility was based upon his lack of subjective fear, and the finding as to his alleged lack of subjective fear was, in turn, based upon a misapprehension of the facts, and was made in a procedurally unfair manner.

[13] The respondent also argues that having rejected Mr. Pi’s claim to fear persecution because of his political opinion, the Board was not obliged to carry out a separate section 97 analysis. According to the respondent, this was “because of the problems with the credibility of central aspects of his claim”. It follows from this that the failure of the Board to carry out a separate section 97 analysis was also tainted by the errors in the Board’s credibility assessment.

[14] While the Board had other reasons for rejecting Mr. Pi’s refugee claim, the cumulative effect of the errors identified above is to render it unsafe to allow the Board’s decision to stand. Consequently the application for judicial review will be granted.

II. Certification

[15] Mr. Pi proposes the following question for certification:

Does the right to a fair hearing include the right to a timely decision?

[16] The delay on the part of the Board in this case was indeed unfortunate. That said, the question proposed by Mr. Pi is not an appropriate question for certification for a number of reasons.

[17] The first is that it is vague, as the term “timely decision” is imprecise.

[18] The second is that when invited to do so, counsel was unable to direct me to any jurisprudence supporting the claim that a delay in releasing a decision constitutes a stand-alone basis for granting judicial review in the absence of a *Charter*-based claim such as the one that arose in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307.

[19] Finally, the answer to the question would not be dispositive of this case, given my findings as to the procedural unfairness on the part of the Board, the unreasonableness of its finding on the issue of subjective fear, and the effect that this erroneous finding had on other findings by the Board. Consequently, I decline to certify the question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed,
and the matter is remitted to a differently constituted panel for re-determination.

“Anne L. Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-426-15

STYLE OF CAUSE: HONGWEI PI v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 14, 2015

JUDGMENT AND REASONS: MACTAVISH J.

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