

Date: 20080520

Docket: IMM-4660-07

Citation: 2008 FC 635

Toronto, Ontario, May 20, 2008

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

YONGHAI JIANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for leave for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act* (the Act) of a decision dated August 13, 2007 wherein the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board) determined that the Applicant was not a “Convention refugee” according to section 96 of the Act, nor a “person in need of protection” according to section 97 of the Act.

I. The facts

[2] The Applicant alleges to have joined an underground Christian church in the People's Republic of China in November 2005.

[3] In April 2006, the Applicant received a telephone call informing him that one of his fellow church members had been arrested by the Public Security Bureau (PSB). The caller instructed him to go into hiding.

[4] While in hiding, the PSB allegedly went to the Applicant's home to arrest him.

[5] The Applicant fled the country, arrived in Canada on June 11, 2006, and claimed refugee protection on June 14, 2006.

II. The Decision of the Board

[6] In a decision dated August 13, 2007, the Board found that, based on a balance of probabilities, the Applicant had never attended an underground Christian church in China given to the inconsistencies in his testimony and the corroborating evidence, and the fact that he was able to leave China, using his own passport, even though allegedly wanted by the PSB.

[7] The Applicant indicated in his Personal Information Form (PIF) that he went into hiding because fellow church members had been caught by the PSB while spreading the gospel, which he described as telling other people about Jesus Christ, with the intention of recruiting new members to

the Church. However, a supporting document written by a reverend in Canada indicated that the fellow member in China was arrested while distributing flyers. The Applicant's explanation was that he told the reverend they were spreading the gospel.

[8] Further, while the claimant stated that April 4, 2006 was the date on which the PSB came to his home to arrest him, the reverend's letter of support indicated the date as being April 3, 2006. The Applicant stated that this was a mistake. While the Board acknowledged that the reverend's letter was hearsay and based on information given to him by the Applicant himself, it was of the view that the inconsistency was so significant that it alone would justify the finding that the knowledge that the Applicant, had regarding Christianity could easily have been learned in Canada in order to manufacture his claim.

[9] Finally, the Board emphasized that the Applicant was able to leave China, using his own passport via the Beijing airport. The Applicant stated that he only had to pass through two security checkpoints whereas documentary evidence indicated that he would have had to pass through at least three security checkpoints. When faced with this information, the Applicant altered his response before he boarded the plane. He was also not aware of whether or not his name was put through a computer database and stated that the snakehead took care of the details of his passage through the airport. The Board rejected this explanation and found it implausible that the snakehead would be able to bribe possibly hundreds of officials as there would be no guarantee as to which border police would be on duty, nor to which line the Applicant would be directed to.

III. Issues

[10] The Applicant raises the following two issues in the present application:

- Did the Board err in failing to make a determination of the Applicant's identity as a Christian?
- Did the Board err in failing to consider the totality of the evidence, (in particular) specifically the Baptism Certificate?

IV. Standard of Review

[11] Given the highly factual nature of the question in issue, and prior jurisprudence of this Court, the applicable standard of review is that of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 51). Thus, the analysis of the Board's decision will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] [...] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para. 47).

V. Preliminary Issue

[12] The Respondent submits that given the fact that the Applicant did not file his own affidavit in support of the present application, the matter should be dismissed or in the alternative that the Court should draw an adverse inference from the failure of the Applicant to provide "evidence of persons having personal knowledge of the material facts" upon which he intends to rely.

[13] The Court notes that the applications not submitted by affidavits based on personal knowledge do not automatically result in dismissal; however, when they are not supported by affidavit, “an error asserted by an Applicant must appear on the face of the record” (*Sarmis v. Canada (Minister of Citizenship and Immigration)* 2004 FC 110, [2004] F.C.J. No. 109 (QL), at para. 10; *Turcinovica v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 164, [2002] F.C.J. No. 216 (QL), at paras. 12-14; *Moldeveanu v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 55 (QL), at para. 15).

VI. Analysis

[14] The Applicant argues that while the Board found that “on the balance of probabilities, [...] the claimant has had never attended an underground Christian church in the People’s Republic of China”, it neglected to make a clear, unambiguous determination with respect to his identity as a Christian. According to the Applicant, his application could have succeeded based on his Christian identity thus the Board was required to make a determination in this respect.

[15] Case law establishes the obligation incumbent upon the Board to make a determination on the central element of the claim. In a line of jurisprudence following *Chen v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 480, [2002] F.C.J. No. 647(QL), this Court has consistently held that even when the Board has determined that an Applicant’s claim of religious persecution in his country of origin is not credible either because he was found not to have been a member of the particular religious group, or because he was found not to be persecuted, the Board still must determine either implicitly or explicitly whether he is now in fact a member of that group

and whether he would face persecution upon their return (*Li v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 266, [2008] F.C.J. No. 338 (QL); (*Huang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 132, [2008] F.C.J. No. 164 (QL); (*Li v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 544, [2007] F.C.J. No. 739 (QL); (*Lin v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 510, [2007] F.C.J. No. 692 (QL); (*Liu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 695, [2006] F.C.J. No. 880 (QL); (*Yang v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 971, [2003] F.C.J. No. 1236 (QL)).

[16] The Respondent highlights the fact that the Board did indeed state in its decision that “[a]ny knowledge that the claimant has learned about Christianity could easily have been learned here in Canada.” Given this statement, the pertinent question becomes whether or not it can be construed as a sufficiently explicit and reasonable finding on the issue of the Applicant’s religious status. In determining what constitutes a sufficiently explicit finding in this regard, the jurisprudence suggests that the manner in which the Board expresses its credibility findings, the evidence before it regarding the Applicant’s religious activities in Canada, and the manner in which it deals with that evidence all appear to be significant factors.

[17] In *Chen*, above, the Court concluded that despite having found that the applicant’s story with respect to her persecution in China as a member of the Falun Gong group not credible, the Board failed to address the central issue of whether she was a member of that group. Specifically, the Court indicated that the Board erred by failing to address the Falun Gong activities in which the applicant had been involved in Toronto.

[18] In *Yang*, above, the Court reviewed a decision in which the Board dismissed the Applicant's claim because it disbelieved her testimony and concluded that she had simply chosen "a convenient way to become a Canadian resident by claiming refugee status." The Court indicated that the Board had scant evidence before it with respect to the Applicant's Falun Gong activities in Canada and that the Board's conclusion that the entire claim and not only the aspects related to persecution in China, was contrived was sufficient to withstand judicial review.

[19] In *Liu*, above, the Court acknowledged that the Board did not make an explicit finding regarding the credibility of the principal Applicant's claim to be a Falun Gong practitioner, but concluded that the Board's decision was not patently unreasonable. The Court distinguished that case from *Chen*, above, by indicating that the Board did in fact examine the principal applicant's attendance of Falun Gong activities in Toronto but, gave this evidence little probative value given the Applicant's admission that the pictures were taken specifically for the purposes of the hearing, and that anyone could attend the event.

[20] In *(Li v. Canada (Minister of Citizenship and Immigration))*, 2007 FC 544, [2007] F.C.J. No. 739 (QL), a Chinese citizen again alleged persecution by the authorities by reason of her being a Falun Gong practitioner. The Board acknowledged that the claimant had provided correct information relating to Falun Gong, and also evidence of her Falun Gong activities in Canada, but concluded that given its determination that the claimant was not a credible witness; the claimant had acquired her knowledge of Falun Gong in Canada to bolster a manufactured refugee claim. In reviewing the decision, the Court indicated that in light of the Board's conclusions that the

Applicant had not been perceived to be a Falun Gong practitioner while in China, and that the Applicant was not presently a sincere Falun Gong practitioner it was unable to find an error in the decision.

[21] However, in two recent decisions of this Court, *Huang*, above, and *Li v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 266, [2008] F.C.J. No. 338 (QL), both involving Chinese claimants who allegedly feared persecution based on their Christian status, the Board concluded that it did not believe that the claimants were members of the underground church, and further that their knowledge of Christianity could have been acquired to bolster their refugee claims. The Court held that the Board erred in both instances by failing to determine whether the claimants were Christian, and if so, whether they would face persecution upon their return. In these cases there is no mention of the evidence that was before the Board regarding the Applicant's Canadian religious involvement.

[22] Based on the jurisprudence, the Court is of the view that where there is evidence before the Board regarding an Applicant's Canadian religious involvement, in order for the Board's conclusion that an applicant is not currently a good faith member of a particular religious group to be reasonable, the Board must address this pertinent evidence and indicate why it was not found to be relevant or trustworthy. This approach is consistent with the case law of this Court with respect to pertinent and contradictory evidence (see *Simpson v. Canada (Minister of Citizenship and Immigration)* 2006 FC 970, [2006] F.C.J. No. 1224 (QL), at paragraph 44; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), at paragraph 15).

[23] In the present case, the Applicant submitted a baptismal certificate as well as a letter from a Canadian reverend. While the letter from the Canadian reverend was referred to when the Applicant's allegations of persecution in China were examined, it was not addressed in the context of the Applicant's present religious membership, where it was much more relevant. The letter attests to the Applicant's active membership in the Living Water Assembly, including his regular attendance at Sunday service and his participation in the congregation's volunteer works. Further, the Applicant's baptismal certificate, attesting to his baptism at the Living Water Assembly, was not addressed at all in the decision. The Board's failure to address these relevant and contradictory pieces of evidence which lend support to the Applicant's contention to be a good faith practitioner of the Christian faith constitutes a reviewable error.

[24] It could very well be that the Board did not believe that the Applicant was a genuine good faith practitioner of the Christian faith and did not accept the pieces of evidence which supported his contentions, but if this was the case, it should have addressed the matter and said so. It does not appear from the decision that the Board did address the evidence supporting the Applicant's contention on this issue.

[25] A statement in the Board's decision that "[a]ny knowledge that the claimant has learned about Christianity could easily have been learned here in Canada" is insufficient and does not address the issue as it did in *Li, Yang*, and *Liu* above. Therefore, the Court will allow the application.

[26] The Court agrees with the parties that there is no question of general interest to certify.

JUDGMENT

FOR THE FOREGOING REASONS, THE COURT allows the application and refers the matter back to a newly constituted Board for rehearing and redetermination.

"Maurice E. Lagacé"

Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4660-07

STYLE OF CAUSE: YONGHAI JIANG v. THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 6, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** LAGACÉ D.J.

DATED: MAY 20, 2008

APPEARANCES:

Leonard H. Borenstein FOR THE APPLICANT

Ned Djordjevic FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates
Toronto, Ontario FOR THE APPLICANT

John H. Sims, Q.C.
Deputy Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario