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Docket: IMM-3479-07

Citation: 2008 FC 654

Ottawa, Ontario, May 23, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

BING LIU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Background

[1] Bing Liu, a citizen of the People's Republic of China (PRC) and a permanent resident of Canada since 2000, challenges the July 13, 2007 pre-removal risk assessment (PRRA) decision made by a PRRA officer (the tribunal) determining he would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country of nationality. In coming to this conclusion, the PRRA officer relied heavily on an April

2007 report from the UK Border and Immigration Agency, Country of Origin Information Service Report on China (The UK Home Office Report).

[2] The applicant became a permanent resident of Canada on his wife's sponsorship; they are now divorced. In May 2003, Mr. Liu was convicted in Toronto of sexual assault; he received a one year suspended sentence with conditions less time served.

[3] As a result of his conviction, he was reported as being inadmissible pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act* (the *Act*). An admissibility hearing was held; Mr. Liu was found to be a person described in paragraph 36(1)(a) of the *Act* and was ordered deported. His appeal to the Immigration Appeal Division (IAD) was deemed abandoned after his failure to attend a scheduling conference. He never sought leave of this Court from the IAD decision. The authorities then took the necessary steps to enforce the deportation order hence his PRRA application and the subsequent PRRA decision which is the subject of this proceeding.

Mr. Liu's PRRA submissions

[4] The applicant's PRRA submissions dated February 8, 2007 from his counsel expressed a central fear in these terms:

In addition Mr. Liu fears that if he is forced to return to China, he will be detained by the Chinese authorities based on his criminal conviction for sexual assault in Canada. He is afraid of what the Chinese authorities and inmates would do to him in prison. Sexual offenders are treated like pariahs in China. Even if he is afforded a trial, he does not believe he will receive a fair trial. The punishment he will receive will be harsh and disproportionate to the crime he committed in Canada. [Emphasis mine.] (Applicant's application record, page 70.)

[5] In his PRRA submission, his counsel referred to documentary evidence on human rights violations and corruption in China, including:

- The US DOS report for 2005 on China;
- Amnesty International's Annual Report on China for 2006;
- The Human Rights Watch Country Summary for China, January 2007;
- A specific Amnesty International Report entitled "Fear of torture and ill treatment without charge" (July 1 and December 1, 2006);
- Human Rights Watch's "China: Letter to President Hu Jintao, September 2006";
- Amnesty International Death Penalty News, January 2006;
- Extracts from BBC News.

[6] The certified tribunal record (CTR), page 11, discloses that by letter of June 27, 2007, the PRRA officer offered Mr. Liu's counsel an opportunity to provide additional submissions in support of his PRRA application. His counsel responded by submitting two letters dated July 4, 2007. In the first letter, counsel encloses numerous additional human rights reports which, in his view, show:

"Torture, arbitrary arrests and house arrests continue to be widely practiced in China. Death penalty continues to be exercised. Human rights situation continues to be extremely poor.

Mr. Liu is at risk of being detained and imprisoned. He has a conviction of sexual assault and fears that he will be detained for that in China. Prison conditions are abysmal and abuse of prisoners remains pervasive. Those convicted of sexual assault are treated particularly harshly.

Recent documentary evidence illustrates corruption, serious abuses within the justice system, arbitrary arrests, extra judicial killing and deteriorating human rights conditions in China."

(CTR p. 13)

[7] The second letter, on the same date, again stressed the fact Mr. Liu “had been convicted of sexual assault will come to the attention of Chinese authorities no matter where he goes in China. He fears that he may be imprisoned for the committed offence, even though he has served his sentence in Canada”. Counsel enclosed recent documentary evidence to buttress the points he was making. (CTR p. 14)

[8] It would appear that the UK Home Office report (CTR 114) which the PRRA officer relied on was provided under cover of counsel’s July 4th letter. Specifically that report which is dated April 30, 2007 contained two paragraphs under the heading “Double jeopardy” which read:

10.15 As reported by the Canadian Immigration and Refugee Board (IRB) in a report dated 9 March 2001, “A Professor of Law at the University of Washington who specializes in Chinese criminal law was unaware of any cases in which the government of China has retried individuals for crimes committed outside China and for which sentences had already been served (8 Mar. 2001). Additional and/or corroborating information could not be found among the sources consulted by the Research Directorate.” [3v]

10.16 In a letter dated 15 July 2005, the FCO (British Foreign & Commonwealth Office) stated the following:

“The circumstances under which an individual would be punished in China for a crime committed in a foreign country for which he had already been punished in that country are unstipulated. The Chinese authorities are most likely to take this action if the crime had received a lot of publicity in China, if the victims were well-connected in China, if there were a political angle to the original crime or if the crimes were of a particular type that the authorities wanted to make an example of. Our Embassy in Beijing is unaware of such instances. The specific inclusion in the Criminal Law of ‘exemptions’ from second punishment in China for crimes committed abroad suggests that the authorities would not take further action against ordinary criminal offences”. [31g] [Emphasis mine.]

The PRRA officer's decision

[9] The PRRA officer indicates in his assessment he received Mr. Liu's PRRA submissions on February 9, 2007 in which Mr. Liu "maintains that he faces risk of detention and imprisonment in China for a foreign sexual assault conviction although he has already served his sentence in Canada. The letter from counsel contends that those convicted of sexual assault are at an increased risk of ill treatment".

[10] The PRRA officer notes the applicant was given an opportunity to submit additional evidence and states he has read Mr. Liu's PRRA application carefully as well as the documentation regarding current country conditions in China.

[11] The PRRA officer reiterated he considered all reports regarding human rights in China and opined "these documents are general in nature and they assist in assessing general country conditions." He added: "However, little evidence has been submitted to support the allegation that the applicant would be subject to detention upon return as a result of his criminal history."

[Emphasis mine.]

[12] The PRRA officer then focussed on Article 10 of the *PRC Criminal Code* which stipulates:

Any person who commits a crime outside PRC territory and according to this law bear criminal responsibility may still be dealt with according to this law even if he has been tried in a foreign country: however, a person who has already received criminal punishment in a foreign country may be exempted from punishment or given a mitigated punishment.

[13] The PRRA officer then referred to documentary evidence, as noted above, on the manner which this section is applied by the Chinese authorities. He wrote:

According to the UK Home Office report, the Foreign Commonwealth Office has stated that Chinese authorities are unlikely to take further action against ordinary criminal offences, and are more interested in pursuing well-connected criminals or high profile media cases. A Professor of Law at the University of Washington who specializes in Chinese criminal law was unaware of any cases where the Chinese government retried individuals for crimes committed outside China, and for which sentences had already been served. Although the criminal code provides for it, there is little evidence to demonstrate that the government uses this provision in practice to detain returning nationals. The general country documentation confirms that prison conditions for inmates in China are very poor. However, insufficient objective evidence of personal risk to the applicant related to further punishment for his criminal record has been submitted. [Emphasis mine.]

and concluded:

Based on a thorough review of all the evidence before me and the documentary evidence, I find that there is less than a mere possibility that the applicant would face persecution upon his return to China. Further, there are no substantial grounds to support that he would face torture, nor are there reasonable grounds to believe that he would face a risk to life or a risk of cruel or unusual treatment or punishment.

The Applicant's arguments

[14] Counsel for the applicant argues the heart of the applicant's fear is if returned to China, he will be arrested and retried for the crime he committed in Canada for which he was convicted here and has served his time. The reason the PRRA officer came to the conclusion she did is her reliance upon the UK Home Office report in March 2007 which references two sources:

- A 2001 Canadian Immigration and Refugee Board (IRB) report which itself relies upon a Washington Professor of Law's opinion on who is likely to be retried by the Chinese authorities for crimes committed abroad;

- The July 2005 British Foreign and Commonwealth Office's views on the same question.

[15] The essence of counsel for the applicant's argument is that the PRRA officer's reliance on the UK Home Office report is undue particularly in the context of the regressive and press controlled regime run by the Chinese authorities which all country reports flag as having a very poor human rights record and where its judicial system is known for its lack of transparency, its secrecy, its lack of a presumption of innocence and the absence of safeguards for judicial independence.

[16] In this context, she argued how much weight or reliance could be placed on the law professor's conclusion he was "unaware" of any case of the Chinese authorities retrying its citizens who had committed crimes abroad and had served their sentences. How good is his unawareness in China's secretive society she asked.

[17] Counsel for the applicant also argues the PRRA officer erred by omitting to consider a category of persons who are likely to be retried in China, i.e., those persons whose crimes were of a particular type that the authorities there wanted to make an example of. An example might be sexual assault.

Analysis

a) Standard of review

[18] The particular task the PRRA officer was mandated to perform is set out in subsection 113(b) of the *Immigration and Refugee Protection Act* (the *Act*) which stipulates consideration of the application for protection [be] on the basis of sections 96 (persecution) and 97 (risk of torture and risk of cruel and unusual treatment or punishment) of the *Act*. The PRRA officer arrived at the conclusion she did, as noted, by reliance on the two sources mentioned in the UK Home Office report.

[19] The issue raised by the applicant is the PRRA officer's assessment of the evidence and the making of a finding of fact triggers, in my view, the application of subsection 18.1.4(d) of the *Federal Courts Act*. The applicant's obligation was to demonstrate to the Court that the PRRA officer's finding was arrived at capriciously or arbitrarily or without regard to the evidence before her, a breach of which in the post-Dunsmuir era is gauged on the reasonableness standard.

b) Conclusions

[20] For the following reasons, the application for judicial review must be dismissed.

[21] First, the PRRA officer was entitled to give proper weight and rely on the UK Home Office report. This document is prepared for use by officials involved in the asylum/human rights determination process and includes information available up to March 31, 2007. The report notes the material used is "a collation of material produced by a number of reliable information sources"

and is subject to oversight by an Advisory Panel on Country Information (see Applicant's Record, pages 2001 and 2005).

[22] Secondly, reliability and weight of evidence are matters within the purview of the decision maker. The jurisprudence is clear that on judicial review, the reviewing judge is not to re-weigh the evidence before the tribunal.

[23] Third, taken as a whole, the PRRA officer's decision makes it clear she was aware of the infirmities of China's judicial system and human rights record.

[24] Fourth, while counsel for the applicant is correct to say the PRRA officer did not mention one category of persons returning to China may be retried, nothing turns on this omission since the British Embassy in Beijing was not aware of any such instances.

[25] Fifth, this is not a case where there were contra-reports differing from what was said in the UK Home Office report on how section 10 of China's *Criminal Code* was administered. The applicant could not refer to any such counter evidence.

[26] Sixth, this is a case where the PRRA officer concluded the applicant did not muster sufficient evidence to make his case which was his onus.

[27] Seventh, my colleague Justice Heneghan's decision in *Man v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 85 is on point in terms of the evidence on how Article 10 of China's *Criminal Code* is applied with reference to the IRB report buttressed by other evidence.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is dismissed. No certified question was proposed.

“François Lemieux”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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