

Federal Court



Cour fédérale

Date: 20090520

Docket: IMM-4377-08

Citation: 2009 FC 502

Ottawa, Ontario, this 20th day of May 2009

Before: The Honourable Mr. Justice Pinard

BETWEEN:

Zhiqiang HE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated August 21, 2008, determining that the applicant is not a Convention refugee or a person in need of protection.

[2] The applicant, Zhiqiang He, is a citizen of China. He claims to be a Convention refugee and a person in need of protection within the meaning of section 96 and subsection 97(1) of the Act, based on persecution he would face in China as a practitioner of *Falun Gong*.

[3] In early 2003, the applicant says that he was diagnosed with a serious gastric ulcer. He claims to have later been diagnosed with stomach cancer, around which time he was introduced by a friend to *Falun Gong*. After becoming a practitioner, the cancer was eliminated.

[4] On October 21, 2005 around 10 p.m., while on a business trip to Canada, the applicant claims that he was discovered practising *Falun Gong* in his hotel room by his boss, Mr. Wang, who is a party member. Mr. Wang said he would report him to the police in China upon their return the following day.

[5] The claimant says that he left the hotel in the middle of the night. After learning in December 2005 from his wife that the Public Security Bureau (“PSB”) had come to their home in China to arrest him, he claimed refugee protection.

[6] A hearing before the Board took place on July 24, 2008. In a letter dated September 17, 2008, the applicant was informed that the Board had determined he was neither a Convention refugee nor a person in need of protection.

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[7] In its reasons, dated August 21, 2008, the Board accepted the applicant's identity, but had significant concerns about his credibility:

- First, while the applicant produced a medical report indicating that he had been diagnosed with gastric ulcers, he was unable to produce any evidence that he had ever been diagnosed with stomach cancer. Nor was he able to provide an explanation for the lack of such evidence, when asked. The panel was therefore not persuaded that the applicant had been diagnosed with stomach cancer.
- More significantly, the Board was “deeply troubled that the claimant appears to have come up with four similar but different versions of” the confrontation in the hotel room with his boss, which the Board identified as the “pivotal event” in his narrative. These four versions are found in his initial Personal Information Form (“PIF”), his amended PIF, his intake interview, and his oral statements at the Board hearing. According to the panel, the applicant was quite confused about the sequence of events in his oral testimony. The panel member writes, “I really, at this point, still do not have a clear idea as to exactly what the claimant is alleging that happened when Wang came into his hotel room”.

[8] Additionally, the Board found it implausible that the applicant's boss would have recognized the sitting position he was in (namely, the fifth *Falun Gong* exercise) as a *Falun Gong* exercise, given that “any number of oriental disciplines use a similar position”. The panel member also found it illogical that the applicant's boss would “tip him off” by informing him of his intention to report him to the authorities, rather than keeping his suspicions to himself and quietly accusing him when they returned.

[9] With regard to the section 97 analysis, the panel member noted that the applicant, as he demonstrated at the hearing, was able to perform the fourth *Falun Gong* exercise, and to correctly answer a number of questions about *Falun Gong*. The Board was not, however, persuaded that the applicant's knowledge of *Falun Gong* predated his coming to Canada, given how easy it would

have been “for any intelligent individual to, *ex post facto* in Canada, acquire sufficient knowledge about *Falun Gong* to become proficient in the exercises (the claimant now is part of a *Falun Gong* group which practice in a park) and to become knowledgeable of the philosophy of Master Li so that he could pass himself off as a *Falun Gong* practitioner”. Given that he disbelieved the applicant’s claim to have become involved with *Falun Gong* in connection with his alleged stomach cancer, the panel member was unable to identify any explanation for the applicant having taken up the practice in China in the first place. He concluded: “In the circumstances, I think it more probable that the claimant has learned the mechanics and routines of this discipline to bolster his claim for refugee status, and I so find”.

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[10] Dealing first with the applicant’s argument based on procedural unfairness, the latter specifically argues that his right to a fair hearing was violated to the extent that the manner of questioning during the hearing was confusing and failed to give him a full opportunity to respond.

[11] Having read the transcript, I am not satisfied that the panel’s interventions were such as to deny the applicant an opportunity to present his case. I also note that the applicant was represented by counsel at all times during the hearing, and at no point did counsel raise a concern about the fairness of the proceeding.

[12] Turning now to the applicant's attack on the Board's negative credibility findings, it is well established that such findings are accorded considerable deference (*Aguebor v. Canada (M.E.I.)* (1993), 160 N.R. 315 (F.C.A.)).

[13] In his decision, the panel member expresses concern that the applicant provided four "similar but different" accounts of the confrontation in his hotel room on October 21, 2005. It is plain from the record that there are certain differences among the statements made before the tribunal, the intake officer and in the applicant's PIF narratives. I agree with the respondent that the finding of inconsistency was reasonable and that the Court is being asked to re-weigh the evidence.

[14] The Board also doubts the veracity of the applicant's claims about his cancer diagnosis, which is what allegedly led him to begin to practice *Falun Gong* in China. Although the applicant claims to have been diagnosed by a doctor with this condition, and informed by doctors after further testing was done that "the cancer had been eliminated", he had no documentation to corroborate his statements.

[15] On balance, I find that the Board's credibility findings, though imperfect, were not outside "the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47).

[16] Finally, the applicant argues that the Board erred in finding that he was not a sincere *Falun Gong* practitioner, and in failing to take into account whether the Chinese authorities would consider him one.

[17] More specifically, the applicant asserts that the Board was unreasonable in emphasizing the absence of evidence that he had in fact had stomach cancer, when what was significant was whether the applicant believed he had stomach cancer. Furthermore, the applicant claims that the panel failed to consider how he would be perceived by the Chinese authorities, having acknowledged that since being in Canada he had joined a group of practitioners who do their exercises in the park weekly.

[18] In my view, the Board was not unreasonable in drawing a negative inference based on the applicant's failure to provide any evidence that he had ever been diagnosed with cancer, given the significance of this condition to his account of his initial encounter with the *Falun Gong* in China.

[19] In its analysis under subsection 97(1) of the Act, however, the Board appears to have accepted that the applicant, even if he was not a *bona fide* practitioner of *Falun Gong* prior to his arrival in Canada, had since become familiar with its practices and associated with a group of practitioners. Indeed, the applicant produced photographs of himself in front of a site clearly protesting against the Chinese government's treatment of *Falun Gong*. Country documentation shows that *Falun Gong* practitioners in Canada and other countries are monitored by Chinese government informants. Therefore, whether the applicant is a sincere practitioner or not, a relevant consideration under subsection 97(1) was the potential risk to his life or risk of cruel and unusual treatment or punishment, in view of his perceived involvement in *Falun Gong* through his activities in Canada. In the circumstances, even though "the claimant's general lack of credibility applies to any analysis under section 97(1)", as stated by the Board, it was unreasonable of the tribunal not to give any specific consideration to this significant and relevant factor, which is sufficient to warrant the intervention of this Court.

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[20] Consequently, the application for judicial review is granted and the matter is remitted to a differently constituted panel for reconsideration.

JUDGMENT

The application for judicial review is granted. The decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”), dated August 21, 2008, is dismissed and the matter is remitted to a differently constituted panel of the Board for reconsideration.

“Yvon Pinard”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4377-08

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REASONS FOR JUDGMENT AND JUDGMENT: Pinard J.

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