

Federal Court



Cour fédérale

Date: 20100225

Docket: IMM-1819-09

Citation: 2010 FC 222

Ottawa, Ontario, February 25, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

DONG JIANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and the Tribunal's findings

[1] Dong Jiang is a citizen of China from Fujian. He challenges the March 13, 2009 decision of a member of the Refugee Protection Division (the tribunal) rejecting his claim to be a Convention Refugee and to be a person in need of protection.

[2] His claim has two foundations:

- 1) A sur place claim on the basis he became a Christian in Canada after arriving here on November 10, 2007. He asserts, if he were to return to China, he would practice Christianity by attending an underground Protestant Church. He attends Sunday worship and a Saturday evening Bible class at a Pentecostal Church.

- 2) His second claim relates to political opinion based on his refusal to pay extortion money to officials from the Industry and Commerce Bureau (ICB) after he at the age of 18 and a friend/partner opened a hardware store in June 2006. The ICB officials, it is alleged, came to the store in April 2007 asking for a payment of a quality inspection fee otherwise the store would be shut down. The payment was made. In mid May 2007, the ICB officials returned with a demand for more money; it was refused the next day. On May 30, 2007, the ICB officials returned. Mr. Jiang was absent but his partner was seriously beaten. Mr. Jiang reported the incident to the Public Security Bureau (PSB) to be told nothing could be done because it was a ICB matter. In June 2007, the ICB again came to the store. Neither partner was there but an employee Mr. Wang was. The ICB accused the partners of having a fake business licence. They searched the store and the warehouse and found what they said were bad quality products. The officials called the police to have the partners arrested. The partners went in hiding; Mr. Jiang fled to Canada.

[3] The applicant's credibility was a major factor in the tribunal's determination in respect of both claims, but especially, the political opinion claim. As will be seen, in respect of the sur place

claim, the tribunal's finding rested mostly on its analysis on the documentary evidence but also on his credibility connected to his lack of his knowledge of the Christian faith.

[4] Counsel for the applicant raises three issues in this judicial review application:

- 1) A misconception of the notion of religious persecution.
- 2) Unreasonable findings of fact related to credibility based either on a misstatement of the evidence or made in a perverse or capricious manner.
- 3) Bias on the part of the tribunal.

The tribunal's decision

(1) The sur place claim

(a) The documentary evidence

[5] The tribunal ruled if the applicant "returns to Fujian, where he hails from, he will not face a serious possibility of persecution" finding:

[15] [...] The documentary evidence indicates that the treatment of Protestants by the Chinese government varies from one region of China to another. It also varies between urban and rural areas. As stated in section 12.9 of the National Documentary Package, enforcement of religious regulations are stricter in urban areas, such as in Beijing and Shanghai, while in the rural areas and in the south of China, such as in Fujian, there is less scrutiny and interference in unofficial church activity. [Emphasis mine.]

[6] Adding that:

[16] The provinces of Fujian and Guangdong have the most liberal policies toward religion in all of China, especially concerning

Christianity. Local authorities usually tolerate activities of unregistered Christian groups. There are a number of unregistered churches, along with Bible schools, fellowships and even missionaries that have been allowed to operate in the Fujian for years.

[17] There are some reports of religious persecution of house church leaders, but nothing against ordinary members. Although house church members may at times be arrested, they are released shortly after interrogation.

[18] Of the arrests in other regions of China, the documentary evidence reveals that all were leaders, teachers, and pastors. Most of these arrests occurred in Hubei, Henan, Xingjian, and Jilin. Fujian is not mentioned as a place where Protestants are arrested for attending house churches. [Emphasis mine.]

[7] The tribunal indicated it had examined the applicant's documentary evidence to see if it contained evidence that conflicted with the evidence found in the National Documentary Package concluding "no document that indicates that regular members of a house church have ever been arrested or detained in the Fujian" and it found no document which stated "that Christian Ministers had ever been arrested, convicted or tortured in Fujian", emphasizing:

[20] This is significant. All of the claimant's documents come from Christian sources which track the repression of Christians in China. These sources point out incidents of Christians being arrested, incarcerated, sent to re-education through labour camps and tortured by the Chinese authorities for practicing unauthorized forms of Christianity. Claimant's documentary evidence comes from such sources as The Center for Religious Freedom, The Voice of the Martyrs Canada, persecution.net/news/china83, ReligionNewsBlog.com, Friends of Falun Gong USA, Christianity today and ChristiansUnite.com.

[21] The claimant's documentary evidence corroborates the documentary evidence found in the National Documentary Package. If one is merely a regular church member of an underground Protestant House Church in Fujian, there is less than a mere possibility that such a member would face a serious possibility of persecution. If the claimant had resided in other Chinese provinces,

such as Jiangsu, Hubei, Henan Zhejiang, Sichuan, Xinjiang, Jilin and Anhui or in China's Inner Mongolia Autonomous Region a different finding may have been reached. In those provinces, the claimant has found documentary evidence indicating that ordinary Christians and their leaders have suffered for practicing Christianity in the way they wish to practice it." [Emphasis mine.]

[8] It remarked only two articles provided by the applicant "even mention Fujian" with one article published by the Voice of the Martyrs "states that a newly built church in Fujian was destroyed in July 2007". It stated no reasons were given why the church was destroyed other than for security reasons remarking: "It is impossible to ascertain what the security reasons are from the one article"; and: "Further, it does not indicate that any church member was arrested or harmed when the church was destroyed." As to the other article, the RPD said it reported a well-known Christian activist living in Australia mailed his sister Christian materials and books to disseminate in China. The activist's sister was arrested and charged with subversion of state power [just before the 2008 Olympic Games]. The tribunal said: "The applicant provided no further information to indicate whether that person is still incarcerated."

[9] It concluded: "Without more, I can only observe that the claimant has put into the documentary evidence only one example of only one person who has been arrested and charged with a crime in connection with Christianity in Fujian from 1995 to 2008." It noted the person who was arrested just before the Olympic Games was "no mere regular member of an underground church and that her family are well-known Christian activists". [Adding]: "If Miss Songping, a well-known activist who received Christian mail close to the time of China's Olympic games, is the only person documented from Fujian to be arrested for an action associated with her Christian

practice, I find that the claimant will not face a serious possibility of persecution by attending an underground Protestant House Church when he returns to China.”

[10] The tribunal then made the following finding in respect of section 97 of IRPA:

[26] The claimant has not alleged that he faces a risk to life or cruel and unusual treatment or punishment in connection to his Christian faith in China. For this reason, I find that on a balance of probabilities, he does not face such a risk in China.

(b) The applicant’s credibility

[11] The tribunal’s credibility finding is expressed in the following brief paragraph:

[27] In addition to the above, I also find that the claimant was not credible. I do not find that the claimant is a Christian who will attend any church in China. The thrust of the claimant’s testimony is that he wants to practice a particular form of Christianity without hindrance in China. And yet, after allegedly attending weekly study and prayer services at a Pentecostal Church for 14 months, the claimant has not mastered the most basic concepts of his form of Christianity. The claimant could not answer definitely the question: What happens to someone after they die if they have not, in this life, accepted Jesus Christ as their Saviour. If the claimant does not know and truly believe the answer to this most basic question for Pentecostal Christians, I find that the claimant is not a Christian on a balance of probabilities. I do not believe that the claimant will be attending any church in China; he hasn’t inculcated Pentecostal theology. Either he hasn’t attended church and weekly study sessions or he has not opened himself up to the lessons he should have learned and accepted. Either way I do not find it credible that the claimant is a Christian. [Emphasis mine.]

(2) The political claim

[12] I need not summarize the tribunal’s findings on the political claim since in oral argument counsel for the applicant did not address this issue.

(3) The Bias claim

[13] In her reasons, the tribunal touched upon the “application for recusal” alleging her questioning and conduct would lead to an apprehension of bias. The tribunal quoted the well known test for the establishment of a reasonable apprehension of bias stated in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 “is whether an informed person, viewing the matter realistically and practically and having thought the matter through would conclude that the decision-maker would decide fairly or not.” [Adding:] “Therefore, the test is whether such an informed person would conclude that the Panel was going to decide unfairly against the applicant based on my questioning and conduct toward the claimant.”

[14] The tribunal mentioned to three objections raised by counsel:

[45] Counsel averred that my line of questioning on a religious issue was repetitive after the claimant had already answered the questions. He stated that I should not have asked the claimant questions about the extent of corruption in China. Finally during the hearing itself, counsel objected to my stopping counsel from answering a question that I had posed to the claimant.

[15] She addressed the three points. First, she indicated: “In assessing credibility about whether one has converted to Christianity, a panel member must ask probing questions in order to come to a conclusion as to whether the claimant is a Christian or whether the claimant is using religion as a pretext. Here, the claimant averred in his Personal Information Form and in his testimony that he could only attend one type of church in China *because of* his theological beliefs. An understanding of the claimant’s beliefs was thus an essential part of the hearing.”

[16] She noted counsel for the applicant's submission that she repeatedly asked the claimant the same question about his beliefs about heaven and hell. The tribunal stated the record did not indicate this but rather "the record indicates that counsel himself volunteered the claimant answered the questions reluctantly and not definitely. She concluded that it was because the claimant was reluctant to answer she had to probe to find out whether he had a definitive answer in order to understand what he was really saying on the issue.

[17] The tribunal stressed once again it was for dogmatic theological reasons "this claimant does not want to belong to one church over another in China" [and] "I had to ascertain whether theology was of real significance to the claimant or was a pretext."

[18] On the questions she asked about corruption in China, she stated: "Of course a panel can ask such questions. Such questions are invitations for the claimant to describe what he knows and believes about his country. This is critical to an understanding of a claimant's subjective fear."

[19] She dealt with one last objection on whether it was proper to ask the applicant whether the payment he paid to the ICB was extortion or a legitimate fine. Her answer was: "Whether such a payment is extortion or a fine is the heart of refugee determination. Is such a fine a legitimate prosecution or an improper expression of persecution? This line of questioning does not evidence bias."

The Applicant's submissions

(1) The sur place claim

[20] Counsel for the applicant submits the tribunal committed a fatal error by finding lack of evidence of arrest means no persecution. He points to paragraphs 19, 20 and 21 of the tribunal's decision. He argues this cannot be right because persecution may exist without arrest and detention citing Justice de Montigny's decision in *Zhou v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1210, [2009] F.C.J. No. 1502.

[21] He further argues that nowhere does the documentary evidence say there is no religious persecution in Fujian.

[22] His second major argument concerns the tribunal's statement at paragraph 26 of its reasons where it notes the applicant has not alleged section 97 risks in connection to his Christian faith in China. He points to page 9 of the PIF (CTR, page 134) where he checked yes to the section 97 risks. He further submits examining the tribunal's decision at paragraph 28 illustrates the confusion in the tribunal's mind because in its discussion on political opinion the tribunal mentions the section 97 risks there. There is no basis, in his submissions, for the tribunal to have carved out the religious element from the political claim; the PIF was general and covered both claims.

[23] His third argument relates to the applicant's Christian identity: Is he a Christian? He turns to paragraph 27 of the tribunal's reasons where the tribunal makes a credibility finding based on his inability to answer definitively the basic question: "What happens to someone after they die if they have not accepted Jesus Christ as their Saviour? Counsel submits the tribunal misapprehended the

evidence – got it wrong because he did answer at making reference to page 108 of the CTR where the answer is: “They would go to hell.”

(2) The Bias claim

[24] He argues a review of the transcript evidences the tribunal had a closed mind. This is shown by the comments he made during his questioning of the applicant’s Christian knowledge and the comments he made when counsel objected. The impression he left was that counsel was irrelevant, a nuisance; he also displayed anger at being interrupted. Furthermore, his persistent questioning on the issue of what happens to non-believers when they die and asking the applicant what will happen to his parents when they died was insensitive and showed the tribunal was more interested in impeaching the applicant than finding whether he was a true Christian; it was in his submission an illicit way to get to his religious knowledge.

[25] Counsel also argued bias was also evident in some unfair questions put to the applicant causing unnecessary altercation between counsel and the tribunal.

The Respondent’s submissions

[26] What is important to keep in mind is the applicant had to show objectively if returned to China he would be at risk of persecution – he had to establish a forward looking well founded fear.

[27] She argued a fair reading of the tribunal’s decision reveals it did not conflate arrests as the sole badge of persecution. She points to paragraphs 15 and 16 of the decision where the tribunal found in Fujian there “is less scrutiny and interference in unofficial church activity”, citing

appropriate documentary evidence. Yes, the tribunal took into account arrests in paragraphs 17 and 18 for the purpose of demonstrating there is a distinction between leaders and ordinary members. Paragraph 19 mentions not only arrests but also convictions, torture and detention and paragraph 20 refers to repression and re-education. Other paragraphs speak to “suffering from practicing Christianity in the way they wish to practice it” and “harm”.”.

[28] Pointing to paragraph 23 of the tribunal’s reasons, she argues this is an instance of a high profile individual to which the applicant cannot be compared as similarly situated.

[29] In sum, counsel for the respondent argues the documentary evidence shows where the applicant lives there are minimum constraints, people practice generally freely and those who may be affected unduly do not fit his profile.

[30] On the section 97 issue, she submitted the case law states that no separate analysis is required under section 97 when there is no evidence that would require it. She further submitted, in the case at hand, the tribunal conducted a co-mingled analysis under section 96 and as a result a separate review of the section 97 risks is not required.

[31] On the issue of whether the applicant is a Christian, she took the Court to the transcript at page 107 of the CRT and a reading from that page to page 112 reveals it took a lot of probing to get an answer. The answers were vague. The finding may have been an error but it was not determinative. In substance, she submits the majority of the reasons show the applicant did not have a well-founded fear of persecution if returned to China.

[32] On the bias issue, counsel endorsed the reasons of the tribunal for finding it was not obliged to recuse itself.

Analysis

Standard of Review

[33] The tribunal's conclusions based on findings of fact is reasonableness based on *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 which findings are owed great deference because of paragraph 18.1(4)d) of the *Federal Courts Act* (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraphs 3 and 46 and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at paragraph 38).

[34] The issue of bias is to be analyzed on the basis of correctness as it is a question of fairness and natural justice (see *Dunsmuir*, at paragraph 50).

Conclusions

[35] This application for judicial review must be dismissed substantially for the reasons advanced by counsel for the respondent. The question whether if returned to China the applicant would be at risk of persecution or at risk of torture or of cruel and unusual punishment was essentially based on an analysis of the documentary evidence as expressed in the tribunal's reasons which should not be read microscopically (see *Boulis v. Canada (Minister of Manpower and Immigration)*, [1974] S.C.R. 875, at page 885).

[36] A fair reading of those reasons against a review of the transcript and the documentary evidence leads me to conclude the tribunal did not equate persecution to arrest but considered an array of other relevant factors.

[37] On the Section 97 risks, the case law which counsel for the respondent submitted (see *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, [2004] F.C.J. No. 77, at paragraph 18; *Soleimanian v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1660, [2004] F.C.J. No. 2013, at paragraphs 21 to 25; *Kugaperumal v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 881, [2004] F.C.J. No. 1085, at paragraph 17; and, *Kulendrarajah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 79, 245 F.T.R. 145, at paragraph 13 support the propositions no separate section 97 analysis was required and in any event such analysis was co-mingled with her section 96 analysis such that no separate review of the evidence under section 97 was required. I appreciate section 96 risks are evaluated on a different basis than section 97 risks but here the evidence on both was the same, was co-mingled and could reasonably support both findings.

[38] The finding of the applicant was not a Christian was drawn in error because it did not take into account all of the evidence in the record. However, this finding is not determinative because the documentary evidence reasonably established that Christians of his profile returning to Fujian were not at risk.

[39] Lastly, I dismiss the bias challenge. I read the transcript in its entirety. I agree with the tribunal's reasons no well informed individual looking at the matter practically would consider the tribunal would not deal with the matter fairly. True, there were clashes but in the end they were

resolved in mutual respect. Argument made in the heat of a proceeding is not a badge of bias if as in this case, the tribunal accepted most of the objection made by the applicant's counsel.

[40] For these reasons the applicant's challenge must fail.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review is dismissed. No question of general importance was suggested.

“François Lemieux”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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