

Federal Court



Cour fédérale

Date: 20100513

Docket: IMM-4809-09

Citation: 2010 FC 525

Ottawa, Ontario, May 13, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

XIONG YING HE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for the judicial review of the decision (the decision) of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 28, 2009. The Board determined that the Applicant is neither a convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27.

[2] For the reasons set out below the application is dismissed.

I. Background

[3] The Applicant is a citizen of China, from Fujian province, who claims that if she returns she will be arrested and sent to jail because of her membership in an unregistered house church. The Applicant claims she joined the unregistered house church in 2007, that the church was raided by the Public Security Bureau (PSB), that three of her fellow members were arrested, and that the authorities visited the Applicant's home, and the home of her family, looking for her.

[4] The Board found that the Applicant had not been a member of an unregistered Church in China and that the authorities were not looking for her. The Board stated it came to this conclusion based upon the fact that the documentary evidence did not provide persuasive evidence that Protestant house churches were being raided and members detained, the inconsistencies in the Applicant's story, the lack of an arrest warrant or summons, and negative credibility inferences due to the presentation of inconsistent documentation.

[5] The Board accepted that the Applicant is a regular attendee of a Christian Church in Canada. At the end of its reasons, the Board also stated that the Applicant would be able to practice Christianity in a registered Church in China without any doctrinal constraints.

II. Issues and Standard of Review

[6] The Applicant argues that the Board erred with regard to its credibility findings, its assessment of the evidence, and in expressly stating that the Applicant could attend a state sanctioned Church without compromising her beliefs.

[7] The issues raised in this matter relate to the factual findings of the Board and will be assessed on a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339; *Zhou v. Canada (Minister of Citizenship and Immigration)*, [2009] F.C.J. No. 1502; 2009 FC 1210).

[8] As set out in *Dunsmuir* and *Khosa*, reasonableness requires the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law. In applying this standard, the Court cannot substitute its own appreciation of the appropriate solution for that of the tribunal.

[9] I also note that the Court is to demonstrate significant deference to Board decisions with regard to issues of credibility and the assessment of evidence (see *Camara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 362; [2008] F.C.J. No. 442 at paragraph 12).

III. Analysis

A. *Credibility*

[10] The Applicant argues that the Board erred in drawing negative credibility inferences from the birth certificates she provided for her alleged children and the Board found to be unreliable, and an inconsistency in her testimony with regard to when the PSB had last visited her home. The Applicant states that as the birth certificates are not related to the central issue of religious persecution and therefore the Board erred by failing to deal with the two issues separately. The Applicant further states the Board's credibility findings on this point are unreasonable as she provided an explanation for the inconsistency with regard to when the PSB had last visited her home.

[11] The Board may draw a general credibility inference from specific evidence provided by the Applicant, such as the birth certificates. Therefore, the Board's general negative inference drawn from the unreliable documents provided by the Applicant was reasonable.

[12] While it is open to the Applicant to provide explanations to any inconsistencies, contradictions and omissions in the evidence, it remains open to the Board to consider the response and determine whether it was sufficient (see *Sinan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 87; [2004] F.C.J. No. 188 at paragraph 10). On this record, the Board's credibility determination was reasonable. I agree that the Board's reliance on the inconsistency of

when the PSB had last visited the Applicants home was microscopic (see *Attakora v. Canada (Minister of Employment and Immigration)*, 99 N.R. 168; [1989] F.C.J. No. 444). However, on a whole, the Board's credibility decision was reasonable.

[13] The Applicant also argues that the Board erred in stating that arrest warrants would normally be given to a family member in such cases and by using the lack of an arrest warrant or summons as a partial basis for the decision. The Applicant cited documentary evidence indicating that procedures are not standard across the PSB.

[14] The Board based its decision on documentary evidence that in many cases warrants or summons are normally left. It was up to the Applicant to introduce into evidence all the material to establish that her claim was well-founded and a lack of relevant documents can be a valid consideration for the purpose of assessing credibility (see *Syed v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 357; 78 A.C.W.S. (3d) 579, see also *Sun v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1255; [2008] F.C.J. No. 1570). In this case the Board's decision was reasonably open to it.

B. *The Documentary Evidence*

[15] The Applicant states that the Board erred in its consideration of the documentary evidence in two ways.

[16] First, the Applicant argues that the Board erred in its consideration of the objective documentary evidence by failing to recognize that lesser forms of persecution, such as inhibiting the Applicant's right to practice her religion through fines and harassment, also fit the definition of persecution.

[17] The Applicant supports this position with the case of *Fosu v. Canada (Minister of Employment and Immigration)*, 90 F.T.R. 182; 27 Imm. L.R. (2d) 95. In *Fosu*, Justice Pierre Denault found that persecution of the practice of religion can take various forms, such as a prohibition on worshipping in public or private, and in that case, the ban of the Applicant practicing his religion in public had resulted in the prohibition reaching the level of persecution. Another important finding in *Fosu* was that the Applicant was credible.

[18] In this case, the Applicant was not found to be credible and the Board reasonably found that the Applicant had not been a member of an illegal house church in China. Therefore, the Board did not err in not determining if the alleged religious restrictions rose to the level of persecution.

[19] Second, the Applicant argues that the Board erred by relying on objective documentary evidence and not considering the Applicant's specific testimony, relying on *Lin v. Canada (Minister of Citizenship and Immigration)*, [2009] F.C.J. No. 320; 2009 FC 254. However, in this case, the Board had made a negative credibility determination against the Applicant. Therefore, on this record, it was not unreasonable for the Board to not consider her specific testimony further.

C. *Ability to Practice in a Registered Church*

[20] At paragraphs 20 to 21, the Board stated that the Applicant could practice Christianity in the registered churches in China without any doctrinal constraint on the practice of a genuine Christian. The Applicant argues that the Board erred by finding that the state does not constrain the doctrine of registered churches and misconstrued the evidence before it on this point.

[21] The Court has previously addressed this issue. For example, in *Zhou*, above, Justice Yves de Montigny found that the Board erred by not considering contradictory documentary evidence on the ability of Christians to worship in registered churches. In *Song v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1321; 76 Imm. L.R. (3d) 81, Justice James Russell held that the Board erred and disregarded evidence when it stated "[t]here is no evidence that registered church members are constrained from practicing their religion freely" (see paragraphs 71-72).

[22] However, for the following reasons the decision of the Board in this matter was reasonable.

[23] In *Yu v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 310; [2010] F.C.J. No. 363, Justice Russel Zinn dismissed an application for judicial review even though he found that the Board's determination that the Applicant could freely practice in a registered Church was unreasonable. At paragraph 36, Justice Zinn stated that while the Board erred in its finding that the applicant could freely practice his religion at a patriotic church in China, it does not automatically follow that the decision must be set aside.

[24] While the Board's decision with regard to the Applicant's ability to practice her religion in a registered church was unreasonable in this case, it does not undermine the decision as a whole. The Board had previously found that there was no persuasive evidence that Protestant house churches were being raided and members detained in the Applicant's home province of Fujian and that the authorities were not seeking her for such membership. It flows from this finding that, on the balance of probabilities, the Applicant would be able to return to Fujian and practice her religion.

[25] Therefore, the result that there was not a serious possibility that the Applicant would be persecuted or that she would be subjected personally to a danger of torture or to a risk to his life, or a risk of cruel and unusual treatment or punishment should she return to her country of origin was a reasonable conclusion. As such, the denial of the Applicant's refugee claim was reasonable and should not be set aside.

[26] Each case is different and is composed of a unique documentary record and one should be cautious in applying country findings from one decision of this Court to another (see *Yu*, above, at paragraph 22). The Court must determine if the findings that are unreasonable, viewed cumulatively, undermine the decision as a whole (see *Song*, above, at paragraph 75).

[27] Finally, in *Liao v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1043; [2008] F.C.J. No. 1326, Justice Max Teitelbaum considered a decision where the Board found, *inter alia*,

that the Applicant could practice Christianity in a state church. Deputy Judge Teitelbaum held at paragraph 10:

[10] I agree with the respondent that there are no findings in the decision of the RPD which are perverse, capricious or based on a misapprehension of the evidence before it. The applicant asks this Court to reweigh the evidence and come to an opposite conclusion. This is a judicial review, not an appeal. The decision of the RPD was open to it on the evidence before it and I am satisfied that the Court should not intervene.

[28] Based on the Supreme Court's decisions in *Dunsmuir* and *Khosa*, above, the Board's decision, on a whole, was reasonable and it is not the role of this Court to intervene.

[29] The parties did not raise an issue for certification and none arose.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. this application is dismissed; and
2. there is no order as to costs.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

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