

Federal Court



Cour fédérale

Date: 20100517

Docket: IMM-3129-09

Citation: 2010 FC 544

Ottawa, Ontario, May 17, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LIPENG YIN

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated May 14, 2009 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 26-year-old citizen of the People's Republic of China (China). He began attending a Christian church while studying in Canada on a student visa.

[3] The Applicant returned to China in December, 2006 to visit his ailing grandmother. While in China, the Applicant attended a registered church, which he decided was closely connected to the Communist party. The Applicant left this church to attend an underground church. The underground church was allegedly raided by the Public Security Bureau (PSB) in March, 2007. The Applicant says he was beaten by police officers and taken to the police station. At the police station, he says he was beaten again, interrogated and detained. The Applicant was made to sign a letter of regret before his parents were able to use their connections to pay to have him released. After his release from prison, the Applicant says he obtained medical treatment for his injuries.

[4] The Applicant returned to Canada in April, 2007. He filed for refugee protection on October 17, 2007.

DECISION UNDER REVIEW

[5] The RPD held that the central issue in the Applicant's claim was credibility. The RPD did not find the claimant to be a credible witness with regard to his story of having fears related to his

membership in an underground Christian church and his fear of arrest and punishment at the hands of the PSB in China.

[6] The Applicant alleged that he required medical treatment for the injuries he sustained during the beating. He provided a document dated March 17, 2006 for treatment he received at a clinic on March 11, 2006, and explained that he received the document when he left the clinic. The RPD found that “to the naked eye, the month and year on the document appear[ed] to have been altered, in that the numbers in the date appear to [have been] erased and replaced and [were] also darker in appearance.” The Applicant had no explanation for this alteration. Furthermore, the RPD found that a translation of the medical document showed that the date on the document was March 17, 2006 instead of March 17, 2007. No explanation was provided for this, nor did the Applicant dispute the translation.

[7] The RPD drew negative inferences from date discrepancies between the document and the translation as well as the alteration on the dates of the original document. The RPD did not believe counsel’s suggestion that these alterations could have been made by the “physician author.” The RPD determined, on a balance of probabilities, that the date on the document had been altered to bolster the Applicant’s evidence. As such, the RPD accorded little weight to the document.

[8] The RPD also found it unreasonable that the staff and physician at the hospital would not inquire how the Applicant had sustained the injuries described in the medical report if they were as extensive as the Applicant alleged.

[9] The RPD also drew a negative inference from the Applicant's delay in claiming refugee status. It found

on a balance of probabilities, that the claimant did not claim for protection at the earliest opportunity because he did not fear for his life. Neither is the fact that the claimant was living in Canada, without legal status and in danger of deportation, consistent with his alleged subjective fear.

[10] The Applicant further failed to include in his Personal Information Form (PIF) that the police had given a list of names to customs agents so he would not again be able to enter China. The RPD drew a negative inference from this "significant omission in his PIF."

[11] In summary, the RPD determined as follows:

Based on the analysis and the cumulative effect of the negative inferences and findings, as well as the claimant's inability to provide reasonable explanations, in addition to the claimant's delay in claiming for refugee protection, that the claimant is not, nor has ever been, a member of an underground Christian church in China, nor was he arrested, detained and beaten by the PSB because of his underground religious activities.

[12] While the Applicant provided a baptism certificate and a letter from his church in Canada, the RPD gave this evidence no weight with regard to the claimant's allegations that the PSB in China arrested and beat him and are continuing to look for him. While the RPD accepted that the Applicant had knowledge of Christianity, it found that – based on its finding of credibility – he likely acquired such knowledge in Canada to bolster a manufactured refugee claim and not because he is committed to Christianity. In fact, the RPD determined that "since finding that [he] is not a

member of an underground Christian church in China, I further find that he is not a Christian in Canada.”

[13] The RPD then determined that the Applicant could, on a balance of probabilities, return to China without fear of persecution. Indeed, it determined that “if the claimant wishes to become a Christian and practise this religion in China...he can do so freely in a registered church.” Furthermore, the RPD determined that “there is evidence that house churches are discouraged but increasingly tolerated.”

[14] The RPD rejected the Applicant’s allegation that he could not attend a registered church because registered churches in China are controlled by the government and put the Communist party above God. Rather, the RPD found that “the Bible used in both registered and unregistered Christian churches...are the same.” As a result, the RPD determined that “the claimant could find a patriotic church and he could attend with the doctrine he alleges he believes in, given that the Bibles used in both the underground and registered churches...are similar.”

[15] Based on the cumulative findings and negative inferences, the RPD found that the Applicant’s claim was not made in good faith. The RPD then cited a Refugee Status Appeal case from New Zealand to find that “if there is no good faith requirement in the *sur place* situation, it places in the hands of the claimant for refugee status the means of unilaterally determining the grant to him or her of refugee status.”

ISSUES

[16] The issues raised by the Applicant can be summarized as follows:

1. Whether the Applicant's right to natural justice or procedural fairness was breached;
2. Whether the RPD erred in its consideration of the evidence before it;
3. Whether the RPD breached the Applicant's rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11;
4. Whether the RPD applied the correct legal test in considering the Applicant's conversion;
5. Whether the RPD erred in its credibility findings;
6. Whether there is a reasonable apprehension of bias.

STATUTORY PROVISIONS

[17] The following provisions of the Act are applicable in these proceedings:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[18] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search

proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[19] The Applicant has brought issues to the Court regarding procedural fairness for which correctness is the appropriate standard. See *Weekes (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 293, 71 Imm. L.R. (3d) 4 and *Dunsmuir*, above. Accordingly, correctness will be the standard of review in considering whether the RPD erred in providing inadequate reasons and by relying on international jurisprudence.

[20] Correctness is also the appropriate standard when considering whether the RPD exceeded its jurisdiction. See *Dunsmuir*, above. Similarly, whether the RPD applied the correct legal test is to be considered on a standard of correctness. See *Golesorkhi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 511, [2008] F.C.J. No. 637 at paragraph 8, and *Dunsmuir*, above.

[21] The Applicant has also alleged a reasonable apprehension of bias. The existence of a reasonable apprehension of bias is reviewable on a standard of correctness. See *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 7, [2010] F.C.J. No. 12 at paragraph 27.

[22] Whether the RPD erred in its consideration of the evidence before it is an issue of fact. As such, it is to be considered on a standard of reasonableness. See *Dunsmuir*, above, at paragraph 51. Reasonableness is also the correct standard in considering whether the RPD erred in its finding of

credibility. See *Aguierre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, [2008] F.C.J. No. 732.

[23] When reviewing a decision on the standard of reasonableness, the analysis 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* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ARGUMENTS

The Applicant

Breach of Natural Justice and Procedural Fairness

Inadequate Reasons

[24] The Applicant submits that the reasons of the RPD are inadequate. As stated by *R v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, reasons should not be unintelligible and thus incapable of proper judicial scrutiny on appeal. The Applicant contends that this is the problem in the present case.

[25] The RPD also erred in ignoring the evidence before it and by failing to address this evidence in its reasons. The reasons of the RPD ought to set out the findings of fact and must address the major points in issue. See *Thalang v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 743, [2007] F.C.J. No. 1002 at paragraph 15.

[26] In the present case, the RPD erred in failing to explain why the Applicant could freely worship in state-run churches when it has been determined that others cannot. Indeed, the RPD ignored the “avalanche” of documentary evidence which demonstrates that no free worship is allowed in patriotic churches.

Reliance on International Jurisprudence

[27] The Applicant contends that the RPD erred in relying on a New Zealand Refugee Status Appeal case without prior notice to his counsel. The RPD’s reliance on this decision resulted in an unfair hearing which constitutes a breach of procedural fairness and natural justice. The Applicant suggests this is similar to the case of *Osador v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 87, in which it was determined that “the panel erred in its decision...by reliance upon an unreported decision in an earlier case, to which it had not provided opportunity for the applicant to comment.” See *Osador*, above, at paragraph 7.

Exceeded Jurisdiction

[28] The RPD exceeded its jurisdiction in finding that the Applicant would be “free” to worship in “state-run” and “patriotic” churches. The Applicant suggests that “this type of minute analysis of religious orthodoxy...constitutes a jurisdictional error.”

Charter Breaches

[29] The Applicant also argues that the RPD breached his right to freedom of religion, since “every individual [is] free to hold and to manifest whatever beliefs and opinions his or her conscience dictates.” See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] S.C.J. No. 17 at paragraph 123 (QL). Moreover, the Supreme Court has held that the definition of religious practices for the purpose of section 2(a) should be broadly interpreted. See *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551. According to the Supreme Court, “courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, ‘obligation’, precept, ‘commandment’, custom or ritual.” See *Amselem*, above, at paragraph 50.

[30] The Applicant contends that, based on paragraphs 51-52 of *Amselem*, he only has to show the “sincerity of [his] belief which implies an honesty of [his] belief, and the inquiry into sincerity of belief should be as limited as possible.”

[31] The Applicant submits that the RPD also breached his section 15 *Charter* rights by “discount[ing] other forms of Christian worship.”

[32] The evidence before the RPD demonstrates that China does not recognize freedom of religion outside of the state-controlled system in which all churches are required to register. The RPD erred in ignoring this evidence and in concluding that the Applicant would be free to practise his religion in China.

[33] Since the RPD’s Decision discriminates against the Applicant as a Chinese Christian, the Applicant also suggests that his section 7 *Charter* rights to life, liberty and security of the person have been violated.

Consideration of Evidence

[34] In considering the plausibility of the Applicant’s attending a state-sanctioned church, the RPD made an error similar to that which was canvassed in *Zhu v. Canada*, 2008 FC 1066, [2008] F.C.J. No. 1341. In *Zhu*, the applicant stated that she did not want to attend a state-sanctioned church because it did not place God first. The Court held that the “church fails to follow one of her principal beliefs. This is the conviction that should have been analyzed by the Board.” See *Zhu*, above, at paragraph 14. Such an assessment should also have been made in the case at hand.

[35] Furthermore, in this case, as in *Song v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1321, [2008] F.C.J. No. 1668, the approach taken by the RPD is “consistent with its speculative findings that disregard highly material evidence put forward by the Applicant.” See *Song* at paragraph 70.

Failure to consider specific factors

[36] The Applicant further contends that the error committed by the RPD with regard to his *sur place* claim was similar to that considered in the case of *Ejtehadian v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 158, [2007] F.C.J. No. 214 in which the Court determined in paragraph 11 that

even if the Applicant’s motives for conversion are not genuine...the consequential imputation of apostasy to the Applicant by the authorities in Iran may nonetheless be sufficient to bring him within the scope of the convention definition.

[37] This has also been considered in the Chinese Christian context in which the Court has found that “whether the applicant is a sincere practitioner or not, a relevant consideration under subsection 97(1) was the potential risk to life or risk of cruel and unusual treatment or punishment, in view of his perceived involvement in *Falun Gong* through his activities in Canada.” See *He v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 502, [2009] F.C.J. No. 637 at paragraph 19. Indeed, the RPD erred in failing to properly consider this factor.

Wrong Legal Test

[38] The RPD further erred in applying the wrong legal test with regard to the Applicant's conversion. As determined by the Court in *Jiang v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 635, [2008] F.C.J. No. 808 at paragraph 15,

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 [his] return.

[39] The Court in *Jiang*, above, at paragraph 22, further considered a finding of a lack of credibility and determined 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.

Implausibility Findings

[40] The RPD determined that the Applicant's conduct, as well as that of the Chinese officials, was "unreasonable" or "implausible." The Applicant likens the case at hand to that of *Giron v. Canada (Minister of Employment and Immigration)*, 143 N.R. 238, [1992] F.C.J. No. 481 in which the Federal Court of Appeal held that the Board

chose to base its finding of lack of credibility...on the implausibility of the claimant's account in the light of extrinsic criteria such as rationality, common sense, and judicial knowledge, all of which involve the drawing of inferences, which triers of fact are in little, if any, better position than others to draw.

[41] A lack of credibility based on the extrinsic criteria considered in *Giron* is less insulated from judicial review than a finding of credibility based on problems internal to the Applicant's testimony. See *Ye v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 584. As such, the Court should be willing to intervene with regard to the unreasonable findings made by the RPD in this case.

[42] The RPD further erred in failing to put any alleged contradictions to the Applicant for explanation. As cited in *Malala v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 94, [2001] F.C.J. No. 290 at paragraph 15, "inconsistencies in the claimant's evidence from which a board may find a refugee claimant not credible must be put to the claimant and the claimant afforded an opportunity to explain the alleged inconsistencies."

[43] A presumption of truth applies to the Applicant's allegations. See *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, [1979] F.C.J. No. 248. The RPD erred in not applying the presumption of truth to the Applicant's testimony. Rather, the RPD searched for inconsistencies in the Applicant's evidence to support its negative finding of credibility. This is clearly erroneous.

[44] According to *Dong v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 314, [2006] F.C.J. No. 414 at paragraph 3, jurisprudence teaches that

a tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu.

The RPD failed to consider the Applicant's culture and norms in making its assessment of his evidence and credibility.

[45] Moreover, this Court has held that it is "dangerous to make findings of implausibility based on evidentiary inferences." See *Chen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 270, [2007] F.C.J. No. 395 at paragraph 15. Also, the Court in *Xu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 274, [2007] F.C.J. No. 397 at paragraph 17 found that plausibility findings should be made only

in the clearest of cases, such as where the facts are so far outside the realm of what could reasonably be expected that it could not happen as described, or where there is documentary or other evidence which demonstrates that events could not happen as described.

In the case at hand, the RPD erred by making erroneous findings of plausibility based on evidentiary inferences. The RPD's errors were compounded by conducting a microscopic analysis with regard to the Applicant's claim.

Perverse and Capricious Credibility Finding

[46] The Applicant submits that the RPD also erred in its assessment of his credibility. Indeed, the RPD focused on what the documentary evidence did not say and failed to consider what the documentary evidence did say.

[47] The Federal Court has determined that a finding of credibility cannot be made from a lack of evidence. See *Mui v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1020, [2003] F.C.J. No. 1294. As acknowledged by the Court in paragraph 35 of *Mui*, “while a failure to offer documentation may be a valid finding of fact, it cannot be related to the applicant’s credibility, in the absence of evidence to contradict the allegations.”

[48] The Applicant further submits that the Board was inconsistent in its findings of credibility, making “contradictory findings of negative credibility when the evidence strongly supports the claim, and positive findings of credibility when the evidence undermines the claim.” Such a treatment of the evidence has been held to be an error by the Federal Court of Appeal. According to the Court in *Hilo v. Canada (Minister of Employment and Immigration)*, 5 Imm. L.R. (2d) 199, [1991] F.C.J. No. 228, “this selective treatment in respect of various segments of the appellant’s testimony is not calculated to enhance one’s confidence in the Board’s assessment of the appellant’s credibility.”

[49] In this instance, the RPD made its finding of credibility based on an examination of the evidence that was perverse and capricious.

Reasonable Apprehension of Bias

[50] Finally, the Applicant contends that the RPD's Decision shows a reasonable apprehension of bias. He suggests that the apprehension of bias can be seen in the RPD's:

- a. Disregard of relevant jurisprudence;
- b. Disregard of material evidence;
- c. Findings of implausibility;
- d. Microscopic analysis of the evidence; and
- e. Reliance on foreign jurisprudence without notice to counsel.

The Respondent

Credibility

[51] The RPD considered all the evidence before it in determining that the Applicant was not credible. The Federal Court of Appeal has determined that the RPD is entitled to make negative findings of credibility so long as the reasons for doing so are stated in "clear and unmistakable terms." See *Hilo*, above. The RPD explained numerous concerns with the Applicant's evidence, including implausibilities, contradictions, as well as delay in making his claim. The RPD then put

these inconsistencies and contradictions to the Applicant for explanation. However, the Applicant failed to offer a convincing explanation for the inconsistencies and contradictions.

[52] The RPD drew a negative inference from the date discrepancies between the medical document provided and the translation of the document. It also drew a negative inference from the visibly altered date on the medical document. The Applicant failed to provide a credible explanation for this altered date, and the explanation provided by the Applicant's counsel was speculative.

[53] The RPD drew a further negative inference from the significant omission in the Applicant's PIF. The RPD also determined it was implausible that the hospital staff and physician would not ask the Applicant how he sustained the wounds listed in the medical report.

[54] The RPD also noted the Applicant's delay in making a refugee claim, and found that he did not claim refugee status at the earliest opportunity because he did not subjectively fear for his life.

[55] The RPD is entitled to make a determination that an applicant's testimony is not credible. As stated by the Court in *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238, [1990] F.C.J. No. 604,

Even without disbelieving every word an applicant has uttered, a...panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim... In other words, a general finding of a lack of credibility on the part of an applicant may conceivably extend to all relevant evidence emanating from his testimony.

[56] The credibility findings made by the RPD in this case were clearly based on the evidence presented by the Applicant. In addition, the RPD's finding of credibility was based on central factors of the Applicant's claim.

Implausibility Findings

[57] The Federal Court of Appeal has determined that the RPD has jurisdiction to determine the plausibility of testimony so long as the inferences drawn by the RPD are not so unreasonable as to warrant intervention. See *Aguebor v. Canada (Minister of Employment and Immigration)*, 160 N.R. 315, [1993] F.C.J. No. 732.

[58] The RPD's finding that it was implausible that the staff and physician would not inquire as to how the Applicant sustained his wounds was reasonable. The RPD's finding was open to it, and the fact that more than one conclusion can be drawn from the same evidence does not warrant judicial intervention.

[59] The RPD is not required to accept the Applicant's testimony simply because it is not contradicted. Rather, the RPD is entitled to make reasonable findings based on implausibilities, common sense and rationality. See, for example, *Alizadeh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 11; *Aguebor*, above; and *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415. Indeed, the RPD may reject evidence where it is inconsistent with the probabilities affecting the case as a whole.

[60] The Respondent submits that the RPD's assessment of credibility should not be disturbed where an oral hearing has been held and where the Board has had the advantage of seeing and hearing the witness. This is rebuttable if the Court is satisfied that the Board based its conclusion on irrelevant considerations or ignored evidence; however, this has not been demonstrated by the Applicant. See *Aguebor*, above.

No Presumption of Truthfulness

[61] No presumption of truth arises until an applicant has satisfied the RPD that he is generally credible. The Respondent contends that a precondition to the application of the presumption of truthfulness is "an absence of reasons to doubt the truthfulness of such testimony." See *Maldonado*, above and *Goshi v. Canada (Minister of Citizenship and Immigration)*, 182 F.T.R. 285, [2000] F.C.J. No. 735. The Applicant failed to establish material aspects of his claim with credible evidence. As a result, the presumption of truth does not arise in the case at hand.

The RPD Considered all the Evidence

[62] The Applicant has not demonstrated that the RPD ignored any of the evidence before it. The Applicant simply disagrees with the RPD's assessment of the evidence. However, this assessment is completely within the discretion of the RPD. See *Aguebor*, above.

[63] Furthermore, the RPD is presumed to have considered all of the evidence before it, whether or not it indicates having done so in its reasons. The RPD is entitled to give some documents more weight than others, and it is granted a large amount of discretion in its assessment. See *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598; *Hassan v. Canada (Minister of Citizenship and Immigration)*, 147 N.R. 317, [1992] F.C.J. No. 946; *Velinova v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 268, [2008] F.C.J. No. 340 at paragraph 21. The fact that the RPD did not accept some of the Applicant's evidence does not demonstrate that this evidence was ignored or misconstrued.

Sur Place Claim

[64] The RPD also determined that the Applicant could return to China without fearing persecution if he were to decide to continue practising Christianity. The RPD found that the Applicant could practise his religion at a registered church.

[65] In order to be a refugee *sur place*, the Applicant must show an objective basis for his subjective fear of prosecution. See *Kante v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 525. The Applicant has not discharged this onus.

[66] The RPD did not apply the "credibility of conversion test" to the Applicant's *sur place* claim, as alleged by the Applicant. The RPD's finding that the Applicant may have acquired his knowledge of Christianity to bolster a manufactured refugee claim helped support its finding that

the Applicant was not a Christian in Canada. The Respondent contends that the Board assessed the *sur place* claim, as if he was Christian, on the documentary evidence on Christianity in China.

Accordingly, the case at hand can be distinguished on its facts from the case of *Jiang*, above, which was cited by the Applicant.

[67] The case at hand is also distinguishable from *He*, above, since there is no evidence that people who practise Christianity in Canada would be subject to persecution in China for their religious activities in Canada, unlike those who practise *Falun Gong*.

The Applicant is Free to Practise his Religion in China

[68] The RPD conducted a thorough analysis and determined that the Applicant could practise Christianity freely as a member of a registered church. The RPD's Decision was based on specific evidence before it, including articles from *Christian Science Monitor*. It is the RPD's prerogative to assign weight to the evidence before it.

[69] The RPD also rejected the Applicant's argument that he could not attend a registered church because it puts the Communist Party above God. In making this determination, the RPD weighed the evidence before it and determined that the Applicant could worship in a patriotic church because the Bibles used by registered churches were similar to those used in underground churches. This conclusion was reasonable.

No *Charter* Violations

[70] The Applicant has not demonstrated that his *Charter* rights were violated. The Applicant's *Charter* arguments lack a factual foundation. The Respondent submits that the *Charter* should not be raised in a factual vacuum. To do so would trivialize the Charter and inevitably result in ill-considered opinions. In consideration of a *Charter* claim, it is vital to have a solid factual foundation. See, for example, *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, [1990] S.C.J. No. 92.

[71] The RPD determined that the Applicant failed to provide credible evidence of his status as a practising Christian. Furthermore, the RPD determined that there were opportunities for the Applicant to practise Christianity in China. The Respondent submits that these findings do not affect a *Charter* right.

[72] The RPD found that the Applicant failed to establish that he practised Christianity while in China. Based on the evidence before it, the RPD determined that "the claimant is not, nor has he ever been, a member of an underground Christian church in China, nor was he arrested, detained and beaten by the PSB because of his underground religious activities in China." The Applicant's allegations of *Charter* breaches overlook the factual findings made by the RPD. Furthermore, the Applicant is attempting to assert the application of *Charter* rights to the laws of China.

[73] Similarly, the Applicant's allegation that the RPD lacked jurisdiction has no factual foundation.

Zhu and Song are Distinguishable

[74] Although the Applicant contends that *Zhu* and *Song* lend support to his allegations of errors made by the RPD, the Respondent submits that these cases are distinguishable.

[75] In *Zhu*, above, the Board determined that the applicant was Christian but that her understanding of Christianity was "not sophisticated enough that her religious needs could not be met within the framework of the state-sanctioned church structure." The Respondent contends that the case at hand is distinguishable because the RPD determined that the Applicant was not a member of an underground church, or a Christian in Canada. Nor did the RPD pass judgment on the sophistication of the Applicant's beliefs. Instead, the RPD acknowledged that the Applicant was attending church in Canada, but determined that he had not provided sufficient evidence that he was a practising Christian.

[76] In *Song*, the Court found that the Board had failed to make a determination as to whether the Applicant was Christian. The Court determined that the Board must undertake a more extensive analysis of whether the Applicant was at risk of persecution if he was returned to China. In the case at hand, the RPD determined that the Applicant was not credible and was not a practising Christian

in Canada. Nevertheless, the RPD undertook an assessment of his *sur place* claim and determined that the Applicant was free to worship in a patriotic church in China.

[77] The Respondent contends that the RPD's findings were reasonable. Furthermore, even if the Applicant establishes that the RPD erred in determining that the Applicant could worship at a patriotic church, the finding was "an alternative claim." This makes the case at hand distinguishable from *Song*.

Procedural Fairness and Natural Justice

[78] The RPD's reference to a refugee appeal from New Zealand does not equate to a breach of natural justice. In the case at hand, unlike in *Pompa*, above, and *Osadolor*, above, the RPD did not rely on the New Zealand decision to make a finding of fact. Rather, this case was used as a "similar example of the Board's conclusions." Furthermore, this finding made by the RPD was not determinative. The RPD did not base its Decision on this finding; rather, the Decision was based on the numerous credibility concerns.

Adequate Reasons

[79] The Applicant has not demonstrated that the RPD's reasons were unintelligible or inadequate. Reasons must set out the findings of fact and the principal evidence on which a decision maker's findings are based. They must also address the major points in issue and canvass the

relevant evidence. See *VIA Rail Canada Inc. v. Lemonde*, [2001] 2 F.C. 25, [2000] F.C.J. No. 1685 at paragraphs 21-22.

[80] The reasoning process undertaken in this case makes it clear that the RPD set out and considered the relevant factors before it. The simple fact that the RPD did not discuss each piece of evidence before it is not fatal to its Decision. See, for example, *Hassan*, above.

[81] Furthermore, the Applicant has failed to demonstrate prejudice to his right of judicial review, as is required to prove the inadequacy of reasons. See *Za'rour v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1281, [2007] F.C.J. No. 1647 at paragraph 20.

No Apprehension of Bias

[82] There is no evidence and no sustainable assertion of bias in this case. The Applicant is essentially arguing that a negative finding is sufficient to demonstrate bias. This is clearly not the case. The RPD's Decision would not give rise to a reasonable apprehension of bias in the mind of an informed person, as required by *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716.

[83] While the Applicant alleges a reasonable apprehension of bias against him, the fact of the matter is simply that the RPD was not satisfied that the Applicant met the definition of a Convention refugee or a person in need of protection.

ANALYSIS

[84] The Applicant has raised a broad range of issues for review but, in my view, this matter either stands or falls on the central credibility findings of the RPD. These findings are:

- a. “The panel does not find the claimant to be a credible witness with regard to his story of having fears related to his membership in an underground Christian church and his fear of arrest and punishment at the hands of the PSB in China”;
- b. “When the panel considers the claimant’s testimony as a whole, it finds he is not a credible witness and he has not credible fear of persecution in China”;
- c. “In summary, I find, based on the analysis and cumulative effect of the negative inferences and findings, as well as the claimant’s inability to provide reasonable explanations, in addition to the claimant’s delay in claiming for refugee protection, that the claimant is not, nor has ever been, a member of an underground Christian church in China, nor was he arrested, detained and beaten by the PSB because of his underground religious activities in China”;
- d. “Since finding that the claimant is not a member of an underground Christian church in China, I further find that he is not a Christian in Canada. Any knowledge that the claimant has learned about Christianity, could easily have been learned here in Canada in order to manufacture this claim.”

[85] The RPD’s findings about what the Applicant alleged had occurred in China are supported by a clear and reasonable assessment of the evidence and the Applicant’s responses to questions put

to him. The Applicant was given every opportunity to address and explain the problems with his story raised by the RPD, and the RPD gives clear and reasonable reasons as to why his explanations are unacceptable.

[86] This being the case, the Applicant was reasonably found not to be a credible witness, and not to have been a practising Christian in China.

[87] In the end, then, the reasonableness of the Decision comes down to the RPD's treatment of the Applicant's *sur place* claim. As I read the Decision, the Applicant's evidence about his religious practices in Canada is rejected by the RPD on the basis of a general negative credibility finding:

Given the panel's finding that the claimant is not a credible witness, the panel finds, on a balance of probabilities, that the claimant has acquired his knowledge of Christianity in Canada to bolster a manufactured refugee claim and not because he is so committed to Christianity.

Since finding that the claimant is not a member of an underground Christian church in China, I further find that he is not a Christian in Canada. Any knowledge that the claimant has learned about Christianity, could easily have been learned here in Canada in order to manufacture his claim.

[88] The problem here is that it was not just "knowledge" about Christianity that the Applicant adduced to show that he was a practising Christian in Canada. He provided his baptism certificate as well as a letter from his Pastor at the Toronto China Bible Church, and a letter from a friend named Serena Liu. The Pastor said that the Applicant has been regularly attending the church since May 1, 2006 and that he takes part in church programs. Serena Liu says that she introduced the Applicant to

Christianity in May, 2006 and that he attends church regularly and is an active member of the church.

[89] The Applicant's activities at his church in Canada are not addressed by the RPD. His knowledge of Christianity is referred to and discounted, but the evidence of his regular attendance and participation in his church since May 2006 is not specifically addressed. The rationale offered by the RPD is that because the Applicant was not a member of an underground church in China he is, for that reason, "not a Christian in Canada."

[90] This logic is unreasonably flawed. The Applicant put forward a *sur place* claim with evidence to show that he was a practising Christian in Canada. This evidence is not assessed. The assumption appears to be that because his experiences in China were not credible then everything he has done in Canada as a practising Christian is a complete charade. If this is what the RPD felt, then it needed to explain why the letters from the Applicant's Pastor and Serena Liu could reasonably be discounted. The Pastor's letter is reasonably discounted in so far as it speaks to events in China, but no mention is made of other parts of the letter that speak to the Applicant's activities in Canada. Serena Liu's letter is not even mentioned. Hence, the RPD appears to have overlooked and left out of account evidence that directly contradicts its conclusion that the Applicant "is not a Christian in Canada." This is a reviewable error. See *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425.

[91] If the RPD intends to say that it considers the Applicant's practises at his church in Canada to be a complete charade, then it should have done so clearly with reasons. Simply to say that because the Applicant was not a member of an underground Christian church in China he is not, for that reason, "a Christian in Canada" makes no sense and is unreasonable. Consequently, such a finding cannot be upheld. See *Dunsmuir*, above at paragraph 47.

[92] In *Sheik v. Canada (Minister of Citizenship and Immigration)*, [1990] 3 F.C. 238, the Federal Court of Appeal determined that "a general finding of a lack of credibility on the part of an applicant may conceivably extend to all relevant evidence emanating from his testimony." In the present case, however, the issue is different. The RPD entirely overlooked evidence from people who had observed the Applicant practising Christianity in Canada.

[93] The Respondent cites the case of *Sellan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381 for the proposition that

[w]here the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence.

[94] In the present case, however, the Applicant did adduce independent and credible evidence from his Pastor and fellow practitioner in Canada – both of whom had observed the Applicant at church – that supported a positive disposition of his *sur place* claim. That evidence was simply overlooked or discounted because the RPD did not believe the Applicant's story about what had happened to him in China. The fact that the Applicant may not have been a practising Christian in

China does not mean he is not a sincere, practising Christian in Canada, and there was evidence to suggest that he was which the RPD should have assessed.

[95] The RPD appears to have been aware of some problem with its *sur place* assessment because it went on to make a finding that the Applicant could, if he wanted to practise Christianity, freely do so in China.

[96] In coming to its conclusion, the RPD determined that “there is no evidence that registered church members are constrained from practising their religion freely.” The RPD also finds that upon his return to China, the Applicant “could find a patriotic church and he could attend with the doctrine he alleges he believes in.” The RPD’s justification for this finding is that “the Bibles used in both the underground and registered churches with perhaps possible exceptions, are similar.”

[97] The RPD’s findings in this regard are unreasonable and rife with error. There was ample evidence before the RPD that religion is not practised freely within registered churches, and that the members of unregistered churches may be persecuted. Indeed, there was specific evidence before the RPD with regard to the differences between the religious practices in registered churches versus those in unregistered churches, which could entice believers to turn to unregistered churches in order to freely practise their faith.

[98] The documentary evidence before the RPD contained a document whose sole focus is the examination of the differences between the Chinese Patriotic Church and unregistered Christian

churches. The RPD overlooked this document within its assessment. The evidence before the RPD showed that the religious publications, activities and programs of registered churches are monitored by the government. Furthermore, the evidence stated that there have been reports that patriotic organizations occasionally interfere in doctrinal decisions of registered religious groups. Moreover, according to *International Religious Freedom Report 2006*, the Chinese government has been found to have demanded that the clergy of registered religious groups publicly support government policies.

[99] There existed clear evidence before the RPD to support the Applicant's claim that he could not attend registered churches because they are "controlled by the government and act as mouth pieces for the government." The RPD overlooked this evidence and focused instead on the similarities of the Bibles used in both churches. The RPD erred in overlooking the documentary evidence before it which spoke to the potential significant theological and political differences between the registered and unregistered institutions. The RPD's assessment in this regard is beyond the range of reasonable conclusions that could be drawn from the evidence before it.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed. The decision is set aside and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3129-09

STYLE OF CAUSE: LIPENG YIN

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: MARCH 4, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

DATED: May 17, 2010

APPEARANCES:

Mr. Rocco Galati **APPLICANT**

Ms. Nadine Silverman **RESPONDENT**

SOLICITORS OF RECORD:

Rocco Galati Law Firm **APPLICANT**
Toronto, Ontario

John H. Sims, Q.C. **RESPONDENT**
Deputy Attorney General of Canada