

Federal Court



Cour fédérale

Date: 20110405

Docket: IMM-4585-10

Citation: 2011 FC 417

Ottawa, Ontario, April 5, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

AIBIN MA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a 40 year old woman from Hebei Province in China. Before the Refugee Protection Division of the Immigration Refugee Board (the Board) she claimed that she was wanted by the Public Security Bureau (PSB) in China for her participation in an illegal underground church. Her conversion to Christianity took place on March 11, 2007, the catalyst for which was her alleged husband's infidelity. I use the word "alleged" as the Board found that she was not married as she claimed. Before the Board the applicant testified that a friend introduced her to Christianity. She

claimed that she was informed by this same friend, through her mother, that other members had been arrested during a raid on March 1, 2008. Her friend managed to escape. After discussing the matter with her husband, the applicant went into hiding where she would remain for two months. The PSB then appeared at her home and attempted to arrest her on March 3, 2008 - two days after the raid. The applicant testified that she enlisted the assistance of a “snakehead” who procured for her a legitimate Canadian Visitor Visa (CVV) in order to exit China. The applicant left China on this visa and traveled under her own name.

[2] The Board rejected the applicant’s claim. It predicated its decision on the lack of credibility of the applicant’s allegations related to her personal identity; the credibility of her membership in an underground church in China; the genuineness of her Christian faith in Canada and the risk of persecution should she return to China.

Standard of Review

[3] The Board’s decision is to be assessed in light of the principle expressed in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, namely, whether the decision is within a range of possible outcomes that are reasonable having regard to the law and facts.

Issues

- [4] Counsel for the applicant advanced two issues before the Court:
- a. Whether the Board erred in its assessment of the evidence and engaged in a microscopic review of the evidence and based its decision on issues that were not central to the claim and on minute points regarding corollary issues, while finding almost no credibility problems whatsoever with the evidence regarding the substantive and material aspects of the claim; and

- b. Whether the Board erred by failing to consider how the information in the psychological report may have impacted the evidence in the hearing.

[5] As this case deals with general questions of credibility; *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339, 2009 SCC 12, instructs findings of credibility are to be paid deference. For the reasons that follow, this application is dismissed. The findings that were made by the Board in its decision are neither perverse nor capricious and were open, on the evidence it heard, to be made by the Board. Nor do I find the analysis of the applicant's testimony to be microscopic or focused on matters that are collateral to the core factual elements of the claim.

[6] I shall deal with the question of the psychologist's report first, because it can be dispensed with quickly.

Psychologist's Report

[7] Counsel for the applicant argues that while the Board pays "lip service" to the existence of the psychiatric report at the outset of its reasons the Board does not consider how the applicant's medical condition, as detailed in the psychiatric report, may have affected any of her testimony. To be precise, counsel argues that the fact that she has difficulty with recollection, concentration, anxiety and depression should have been a factor to consider in assessing the credibility of the evidence, and that the psychiatric report could have explained some of the concerns that the Board had with the evidence.

[8] While I agree that the Board must do more than acknowledge the existence of the evidence, this argument cannot, on the face of this record, succeed. The Board both acknowledged the

existence of the applicant's medical condition and it also considered the effect it might have had on her ability to testify on the substance of her testimony. The Board wrote in its decision:

[6] The panel bore in mind the claimant's diagnosis of a major depressive disorder and insomnia included in a letter from Dr. Kenneth Fung. At the onset of the first sitting, counsel was asked what particular accommodations were required for the claimant and he indicated that no specific accommodations were required. The claimant indicated that she was nervous, but she was able to testify at both sittings of the hearing. The claimant was also informed to tell the panel if at any time she required a break or other accommodations.

[7] The panel noted that the documents presented by the claimant's psychiatrist or family doctor did not indicate that the claimant was suffering from any condition which would impair her cognition; however, the documents indicate that the claimant may have difficulty with concentration and memory. The panel noted that at the first hearing the claimant was able to provide significant detail in her testimony. When asked why she could provide such detail when her psychiatrist report indicates that she could have difficulty concentrating and recalling details, the claimant indicated that she took her medicine before coming to the hearing.

[9] The Board had obviously turned its mind to the applicant's depression, anxiety and insomnia and was assured by her counsel that she did not need any special accommodations in order to testify at both of her hearings. The applicant also stated that she was able to recollect details because she had taken her medicine. It cannot be the case, then, as counsel argues, that "the information in the report is at least relevant to the issues of credibility" and "the Applicant's current condition explains some of the credibility issues."

[10] Far greater precision is required in order to show why findings of fact should be set aside based on a medical condition of a witness, or how a medical condition excuses testimony which was not believable.

[11] Finally, to conclude on this ground, the Board noted that the applicant was able to provide detailed testimony at the first sitting. In light of this observation, which is born out by a review of the transcript before this Court, it was entitled to find that her diagnosis was not the reason behind the inconsistencies in her testimony.

Credibility of the Applicant's Allegations Related to her Personal Identity

[12] The applicant's identity and nationality were established through her passport and the Canadian Visitor Visa (CVV). However, the Board wrote:

[9] The panel found that the claimant has failed to provide sufficient credible or trustworthy evidence to establish her identity as it relates to her past travel outside China; her family relationship; and her employment. Taken individually, these factors may not be fatal to her claim; however, as a whole, the panel finds that the credibility concerns with these factors undermined the credibility of the claimant's allegations as well as her overall credibility.

[13] Counsel for the applicant contends that on the basis of these findings, the Board made a general finding that the applicant lacked credibility, but only in areas not central to the claim. In particular by isolating unrelated, perhaps mundane issues related to her work, home street number, the lack of fax transmission on documents received in Canada, the Board engaged in a microscopic analysis of the evidence and has based its decision on findings that are not central or material to the claim that ignores the central and substantive reasons for the applicant's fear of persecution. I will deal with each of these contentions.

Travel outside of China

[14] In respect of the applicant's travels outside of China, the Board wrote:

[10] The claimant testified that she had never traveled outside of China before coming to Canada in 2008. The panel had before it contradictory evidence in the FOSS [Field Operations Support System] notes, which indicated that: “App (applicant) has previous travel to the USA and Japan. Copy of old PPT (passport) submitted.” The panel is aware that genuine Chinese passports and CVVs often can be obtained based on false information through the assistance of smugglers. This could have been the case with the CVV the claimant obtained to come to Canada. What the panel is concerned with is the fact that the Visa office was provided with an old passport which attests to travel in the USA and Japan. The claimant testified that the snakehead provided the old passport to the visa office. The panel finds it reasonable to believe that the claimant’s previous passport was accepted as a genuine document by Canadian Visa officials; otherwise the claimant would not have been issued a valid CVV on her new passport. In addition, the panel finds that, if she had traveled to the USA and Japan, the claimant’s passport would have contained genuine visas from these countries. Given the fact that the claimant was provided with a CVV after verification of her former passport, the panel finds that the snakehead had to have provided a genuine expired passport and visas for the claimant which did not confirm the claimant’s denial of previous foreign travel. Given the evidence to the contrary (FOSS Notes), the panel finds that the denial of previous foreign travel undermined the claimant’s overall credibility, as well as the credibility of her allegations of being a poor weaver from Hebei. For example, the panel finds it implausible for a poor weaver to have previous travel to the USA and Japan. The claimant’s travel casts doubt on the profession and family identity she presented in her Personal Information Form (PIF), and Port of Entry Documents (POE) which form the basis for her claim. [Emphasis added]

[15] Counsel for the applicant argues that while the old passport was submitted and there was evidence that the two visas did appear in the document, there was no evidence, in the way of entry or exit stamps to suggest that the visas were actually used.

[16] The Board, however, was not concerned with whether the applicant indeed traveled but with the fact that these visas were issued to her in the first place. Even granting the fact that she may not have actually traveled on these visas, the fact that they were issued still demonstrated to the Board

that she had the means and intent to travel prior to the date of her conversion and prior to the raid on the church.

[17] This finding related in turn to a further finding of the Board with respect to her employment history. The Board concluded that it was simply unlikely that, if the applicant was indeed a “poor weaver” as she testified, she would have gone through the trouble and expense to procure these visas and then not travel on them. Furthermore, if this was the case, it was incumbent on the applicant to support her denial of ever leaving China, where, on the face of identity documents, she had.

[18] It is true, as her counsel contends, that she could have saved her money and traveled to these other countries, and perhaps, in another context, such travel would have nothing to do with the substantive aspects of the case or her credibility. But in this case the visas rationally related to her credibility and the plausibility of her explanation.

Her Husband

[19] The Board determined that the applicant was not married, as she had claimed. The Board wrote:

[11] The claimant argued that she turned to Christianity in 2007 because of her husband’s infidelity. The panel finds that the claimant has failed to provide sufficient credible or trustworthy evidence in support of a relationship with her husband. The claimant provided a copy of her Family Registry (Hukou). The Hukou included the claimant’s mother, father, and sister; however, it did not contain any reference to the claimant’s husband or son. The claimant submitted a second Hukou which contained the information for her husband and son who lived at a different address. The panel had several concerns with the Hukous presented.

[20] This is finding of fact, reasonably open to the Board. No argument was advanced which, on the evidence, warranted it being set aside, other than to suggest the Board ought to have believed the applicant's explanations.

Receipt of Documents

[21] The Board also had issues with respect to unexplained discrepancies arising from the provenance of documents initially offered to corroborate the applicant's identity. The applicant testified that her husband mailed them to her, but when the dates were inconsistent, counsel advised that they were scanned and sent by email. The Board's conclusion on this point was:

The claimant provided a marriage certificate, 2 hukous, and her work identification to the panel. The claimant was asked how she got the documents in Canada and she indicated that her husband mailed them to her all together approximately 10 days before the first sitting which would be around March 5, 2010. When asked how the documents could be translated on February 10, 2010 if the claimant received the documents on March 5, 2010, the claimant indicated that she had the documents faxed to her earlier. When asked to explain why the documents did not have fax numbers (to and from) on top, the claimant was unable to respond. Counsel submitted that the documents were not faxed, rather they were scanned and e-mailed to the claimant. The panel assigned little weight to this explanation, given that the claimant did not provide this testimony when questioned, and the claimant failed to provide evidence of the e-mail and attachment between the first sitting, where she was questioned related to the documents, and the second sitting where this explanation was only provided by counsel. The envelope presented by the claimant indicated that the documents were sent from China by Clariant International Ltd. The claimant did not know the company. The panel finds that the claimant's testimony about how and when she received the identity documents undermined the genuineness of the documents as well as the claimant's overall credibility...

[22] Again, while it was open to the Board to accept this explanation, it is readily understandable that it did not. The number of inconsistencies in the evidence and testimony supported the inference drawn by the Board.

[23] The onus is on the applicant to produce acceptable documentation establishing her identity. Based on the problems with the applicant's testimony regarding her identity documents and the availability of fraudulent documents, the Board held that it could not place significant weight on her documents.

Marriage

[24] In respect of the applicant's alleged marriage, the Board made similar findings, writing:

[14] The panel finds that concerns with the claimant's marriage certificate undermined the credibility of the relationship. The claimant testified that she got married in 1994. The claimant provided a marriage certificate which was issued on 1 November 2001. When asked why her marriage certificate was dated in 2001 when she was married in 1994, the claimant indicated that she was married according to local traditions. The panel identified several concerns with this explanation. Firstly, the claimant's PIF indicated that the couple was married on November 1, 2001. When asked why she did not indicate that she was married in a traditional ceremony in 1994 and then formalized the marriage in 2001 in her PIF (Question 3), the claimant indicated that she got the marriage certificate in 2001 as she was pregnant and the government did not allow pregnancy outside of marriage. The panel responded that the claimant's son was born in 1995 and this would mean that he was born outside the government policy, and the family planning practices. The claimant reiterated that she got the marriage certificate with her husband and did the health check when she found out she was pregnant. The panel finds that the claimant's explanation did not make any sense, given that, if she formalized her relationship upon learning she was pregnant, the claimant's marriage certificate or marriage registration should have been issued in 1994 to comply with family planning regulations, rather than 2001. Given the concerns with the marriage certificate, as well as the fact that the claimant did not provide other credible or trustworthy evidence in support of the relationship, the

panel finds that the claimant was not married as she alleged in her PIF. [Emphasis added]

[15] The panel finds that the 2 Hukous presented did not confirm a relationship between the claimant and her alleged husband. When asked why she was not included in the Hukou of her husband and child, she responded that her husband and son moved to Tianjin for her son to go to school. The claimant also explained that there is a policy in Tianjin that she had to live 5 years in the city before she was allowed to change her Hukou from a rural to an urban Hukou. The panel assigned little weight to this explanation given that it was not supported by the documentary evidence. The evidence indicates that population movement was strictly controlled prior to 1998 and that separations due to different Hukou classifications were common prior to 1998. After 1998 reforms in the system facilitated Hukou conversions for spouses previously separated by Hukou restrictions. The panel noted that the claimant's Hukou was issued in 2007 and her husband's in 2005, which were well after the reforms. Given the concerns with the method of delivery of the Hukou documents; given the concerns with the genuineness of the marriage certificate; and given that the documentary evidence indicates that the restrictions on family reunification were released in 1998; the panel assigned little weight to the claimant's explanation for providing 2 separate Hukous. [Emphasis added]

[16] Given the credibility concerns with the claimant's evidence and her testimony above, the panel finds that the claimant was not married and therefore her allegations of turning to Christianity because of the infidelity of her husband, were not credible. Given that the claimant testified she had no religion before 2007, the panel finds that the claimant was not a Christian in China. [Emphasis added]

[25] The Board's findings with respect to the existence of a marriage are critical as it was the applicant's husband's infidelity that precipitated her conversion to Christianity.

[26] The essence of the applicant's argument is that in respect of each of the discrepancies in her testimony, there is an explanation to be had. The applicant contends that the rejection of the alternative explanation is unreasonable.

[27] The Board sought an explanation for the 7 year difference between the date of her marriage and the marriage certificate. The evidence on this was:

MEMBER: So when were you married? Is there a specific date?

CLAIMANT: We got registered—I got my marriage certificate in 2001.

MEMBER: Okay. So why did you get your marriage certificate in 2001 if you told me you were married in 1994?

CLAIMANT: We were in a village, so we went according to the local tradition. We invited relatives and friends for a party.

MEMBER: So you invited friends and relatives for a party?

CLAIMANT: For a party, as witnesses. Thus, we are married.

MEMBER: Because your Personal Information Form said that you got married in November of 2001. Why does that say 2001 and then you're testifying that you had some tradition ceremony in 1995?

CLAIMANT: Isn't it 1994?

MEMBER: Okay. I'll check. Nineteen ninety-four (1994). Thank you.

CLAIMANT: When me and my husband took the marriage certificate, when we did a health test exam and discovered I was pregnant, our policy for pregnancy outside marriage is not allowed.

MEMBER: So you had your child in August of 1995. So why didn't you get married in August of 1995 officially if it went around against the policy not to – or to be single and married?

CLAIMANT: I got a marriage certificate with my husband and we did a check, a health examination there and I found out I was pregnant. He offered to have an abortion. I was scared.

MEMBER: So the abortion was because you weren't married and you were pregnant?

CLAIMANT: Yes.

MEMBER: So in 1995 – did you abort the baby or did you have the baby?

CLAIMANT: I didn't. I said I need to go to the washroom. I used that chance to run away.

[28] The onus is, of course, on the applicant to make her case before the Board, and to establish it on a balance of probabilities. The applicant has put forth alternative explanations for many of the Board's findings. However, where the standard of review before this Court is that of reasonableness, it is not sufficient to put forward an alternate explanation, even one that is equally reasonable. It is for the Board to accept or reject the evidence, in this case the explanation or rationalization of the inconsistency. What the applicant must do to succeed before this Court is point to a conclusion that is outside the scope of reasonableness. Here, the applicant has failed to persuade me that the rejection of the explanations, individually, or the decision as a whole, is unreasonable.

[29] It was open for the Board to draw the conclusion that the applicant is not married, and therefore that the other aspects of her claim lacked credibility. The Board is entitled to make findings based on implausibilities, common sense and rationality, and may reject testimony if it is not consistent with the case as a whole. In this critical aspect of whether and when the applicant was married, the conclusion reached by the Board was logically open to it.

Employment

[30] In respect of the applicant's employment as a weaving machine operator or weaver, the Board wrote:

[17] The panel finds that the claimant has failed to provide sufficient credible or trustworthy evidence to support her assertion that she was a weaver with Hong qi No. 1. The claimant was asked when she began to work at Hong qi and she indicated 1988. When asked why her PIF (Question 7) indicated that she began at the factory in October of 1986, the claimant indicated that she could not remember clearly. The panel assigned little weight to this explanation given that the claimant was able to provide significant detail in her testimony just previous to the employment question; and given that the claimant's PIF indicated that she had started to work in the same year she finished middle school. The panel finds that the inability of the claimant to provide consistent testimony about when she began to work, undermined the credibility of her claims of employment. [Emphasis added]

[18] The claimant submitted an Employee Card. The panel assigned little weight to this card as it did not specify the date that the card was issued or the period that it was in force. In addition, as noted above, the panel finds the claimant's testimony with how she received documents from China not to be credible, and therefore, the panel assigned little weight to the card in support of the claimant's employment. [Emphasis added]

[19] Given these concerns, the panel questioned the claimant on her work. The panel finds that the claimant failed to provide sufficient credible testimony to persuade the panel that she had been a weaving machine operator for 22 years. For example, the claimant was unable to provide detailed testimony on her daily tasks; the make or model of the weaving machine; the mill's primary clients; etc. The panel took into account the limited education that the claimant alleged; however, the panel finds that even despite limited education, it would be reasonable for someone who had done the same job for 22 years to provide detailed descriptions of her job. Given the claimant's inability to provide sufficient credible testimony related to her work, and given the concerns with the claimant's employee card; and the dates of her employment in her PIF; the panel finds that the claimant has not established that she was a weaving machine operator. [Emphasis added]

[31] The applicant argues that her occupation as a weaver is not central to the claim and should not have completely undermined her credibility. I agree. The problem for the applicant, however, is that it did not. It was not this finding alone that undermined her credibility; it was all of the

findings pieced together which supported what the Board determined was a fraudulent refugee claim.

[32] With respect to this specific issue, the more significant problem, however, is the applicant's inability to provide detailed testimony on her daily tasks, the make or model of the weaving machine she used, or the mill's primary clients. The Board found that this was simply not a plausible outcome after spending 22 years in this position. While the applicant argues that the Board makes an inappropriate connection between the affordability of travel and the applicant's employment as a weaver, the issue is one of credibility in respect of whether she is weaver or a weave operator as claimed.

[33] A review of the applicant's testimony on the question reveals a bare minimum of generic knowledge about working as a weaver. The Board reasonably expected more and none was forthcoming. Again, a review of the transcript demonstrates that the Board was giving her every opportunity to provide details and none were forthcoming. I do not consider the omissions in the applicant's testimony to be either microscopic or immaterial.

The Credibility of the Applicant's Membership in an Underground Church in China

[34] In respect of the applicant's alleged membership in an underground church, the Board wrote:

[20] ...the claimant has established that she is Aibin Ma, born on June 22, 1970 through her passport; however, she has failed to establish her family relationship and her employment, which she swore were truthful in her PIF and oral testimony. Given that the claimant has failed to establish her relationship with her husband, the panel finds that there is no reason for the claimant to have turned to

Christianity as a result of her husband's infidelities. Given this, the panel finds that the claimant has failed to establish that she attended church in China and therefore, the panel finds that the claimant is not a wanted person in China for her alleged religious practices.
[Emphasis added]

[21] Furthermore, the panel finds that, based on the findings above, the claimant came to Canada on her own passport and visa. Given that she had a legal exit from China, the panel finds that, on a balance of probabilities, she is not wanted by the PSB given the country's exit controls.

[35] On the finding with respect to exit controls, counsel for the applicant contends that the Board's decision is clearly in error as the issue has been resolved by the Federal Court.

[36] In *Song v Canada (Citizenship and Immigration)*, 2008 FC 1321, the Court dealt with the effect of a person leaving the country on their own passport. The Court overturned the Board decision that the claimant could not have been wanted and yet still leave the country with the use of a genuine passport. Here, however, the Board found that since the applicant traveled on her own passport and visa; and since she had a legal exit from China, that on a balance of probabilities, she was not wanted by the PSB. In the case of *Song* in contrast, sets out that the Board speculated that it was not possible that the applicant could have bribed officials to leave the airport. There is no evidence or suggestion that the applicant bribed officials in order to exit the country. Hence, the Board was faced with what appeared to be a lawful exit from China.

The Genuineness of the Applicant's Christian Faith in China and in Canada

[37] The Board found the applicant not to be a practicing Christian in China. It then addressed the question of her Christian practice in Canada:

[23] The panel finds that the claimant displayed significant Christian knowledge through her oral testimony. The claimant provided evidence from the Living Water Assembly attesting to the claimant's attendance at church and her Christian identity. Given the credibility findings above, the key issue for the panel was the claimant's motivation to attend church. The panel turned its mind to whether or not the claimants' attendance at Church in Canada represented a genuine faith or was an attempt to bolster a refugee claim. The claimant arrived in Canada on May 10, 2008 and she began attending the Living Water Assembly 8 days later on May 18, 2008, just 5 days after making her claim for refugee protection. When asked how she found a church so quickly, the claimant explained that she was walking downtown and encountered people distributing flyers who she asked where she could find a church. The panel was not provided with testimony or evidence in support of a conversion experience between the claimant's arrival in Canada and her first attendance at church. Given that the claimant was found not to be a Christian in China, and that she turned to a church just 8 days after arriving in Canada, the panel finds that the claimant's attendance at church expression of a genuine faith; rather it was an attempt to bolster a refugee claim based on religion. [Emphasis added]

[24] It is difficult to make a judgment regarding the genuineness of a person's religious practice. In addition to the findings that the claimant was not a practicing Christian in China, the timing of the claimant's first attendance at church in Canada raises substantial doubt about the genuineness of the claimant's motivation to attend church in Canada, and therefore the genuineness of her faith. In this regard, case law indicates that a pastor's assessment of the genuineness of a person's faith cannot be substituted for the assessment that the panel is required to make.

[38] These are factual findings, which were not, and could not be seriously challenged. They were findings reasonably open to the Board.

[39] In sum, the applicant had an explanation in respect of each discrepancy or variation in her testimony. For some, such as the existence of why she sought the marriage certificate in 2001, the explanation was inconsistent with the fundamental issue as to the date of birth of her son. The

existence of an alternate explanation, or interpretation of the evidence, does not mean that the Board's findings are unreasonable, *Eustace v Canada (Minister of Citizenship and Immigration)* 2005 FC 1553.

[40] The application for judicial review is dismissed.

[41] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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DATED: April 5, 2011

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