

Federal Court



Cour fédérale

Date: 20111125

Docket: IMM-1998-11

Citation: 2011 FC 1359

Ottawa, Ontario, November 25, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

FEI ZHENG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Fei Zheng, is a citizen of China. He brought this application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (hereafter IRPA) of the decision of the Immigration and Refugee Board, Refugee Protection Division which found him not to be a Convention refugee or a person in need of protection.

[2] For the reasons that follow, the application is granted and the matter is remitted to the Board for reconsideration by a differently constituted panel.

[3] Mr. Zheng claims to have become a Christian in China, joining an underground Church, after a discussion with a friend who suggested that he would be healed from sleepwalking if he did so. He moved to Canada for studies in September 2008. He claims that his mother called on March 24, 2009 to warn him that the Public Security Bureau came to confiscate his computer and some letters, and to warn him that members of his Church had been arrested. Thereafter, he made a claim for refugee protection.

[4] The determinative issues before the Board were the applicant's credibility regarding his religious affiliation and the risk of persecution of Christians in his home province of Fujian. With regard to the applicant's credibility, the Board drew negative inferences from inconsistencies in his testimony relating to his college attendance and registration, visits to a hospital and religious affiliation.

[5] The Board found that on the basis of the documentary evidence considered, the applicant could return to his home province without fear of persecution. The panel found that reports of reliable neutral sources did not identify any arrests of Christians in the province and identified it as having the most liberal policy on religion in China.

[6] The issues raised on this application were whether the Board erred in relying on a non-disclosed document, erred in its credibility findings and reached an unreasonable conclusion regarding the risk of persecution in the Fujian province. As I have found that there was a breach of procedural fairness requiring that the matter be returned for reconsideration, I do not consider it necessary to deal with the other issues.

[7] Where procedural fairness is in issue, the proper approach is to ask whether the requirements of natural justice in the particular circumstances of the case have been met: *Bokhari v Canada (Minister of Citizenship and Immigration)*, 2011 FC 354 at para 8.

[8] As the respondent submits, a breach of procedural fairness will not result in relief in each case. If it is apparent that the decision maker would have reached the same decision notwithstanding the breach, and no purpose would be achieved by remitting it for reconsideration, the decision should stand: *Yassine v Canada (Minister of Employment and Immigration)*, 1994 CarswellNat 219, 27 Imm LR (2d) 135, 172 NR 308 (CA) at para 9; and *Mobile Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 para 53.

[9] Here, the Board relied upon a document, dated September 7, 2005, that was not disclosed to the applicant and was not found in the Board's national information request package for claims based on religious persecution in China. The document in question was the source of the Board's findings regarding the treatment of underground churches in the applicant's home province. However, the document had been removed from the information package and replaced by an updated version dated June 30, 2010. References to Fujian having a liberal policy on the practise of Christianity had been removed in the updated document based on more recent reports which indicated that such a conclusion would be misguided.

[10] As indicated in *Bokhari*, above, at paragraphs 23-24 and *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461 (CA) at paragraph 16, document disclosure is

important for procedural fairness as it gives the applicant an opportunity to properly respond to the Board's concerns. See also *May v Ferndale Institution*, 2005 SCC 82, at paragraph 92.

[11] Here, the Board's concerns related primarily to the treatment of Christians in the applicant's home province. The earlier document presented a more favourable view of the situation in that province than later information reflected in the 2010 document would support.

[12] The respondent's argument that the 2005 document was not the "cornerstone" of the decision is not persuasive given the Board's reliance on the more positive picture that it presents. Nor am I satisfied, based on a reading of the transcript of the hearing, that the applicant's counsel was aware of the content of the document. It is clear from the transcript that counsel addressed the general question of a more liberal policy in Fujian Province, but without reference to the specific comments in the 2005 and 2010 documents.

[13] In the circumstances, I find that the Board's reliance on the earlier document constituted a breach of procedural fairness. I am unable to agree with the respondent that the 2010 changes to the document are so trivial that I should find that the decision maker would have reached the same conclusion notwithstanding the breach.

[14] The application is, therefore, granted. No serious questions of general importance were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for reconsideration by a differently constituted panel of the Refugee Protection Division. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1998-11

STYLE OF CAUSE: FEI ZHENG

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 20, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** MOSLEY J.

DATED: November 25, 2011

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