Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-6214-11

Citation: 2012 FC 545

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

DAN NI CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, a citizen of China, claims refugee protection in Canada as a Christian because of subjective and objective fear that should she be required to return to China she will suffer more than a mere possibility of persecution under s. 96 of the *IRPA*, or probable risk under s. 97. The present Application concerns the rejection of her claim on what is argued by the Applicant to be contentious findings made by the Refugee Protection Division member concerned, Mr. L. Favreau.

[2] A summary of the Applicant's claim is stated in the decision as follows:

> The claimant alleges that in 2009 she was introduced into Christianity by her boyfriend. She began attending underground church services June 7, 2009 and attended regularly thereafter. On October 12, 2009, the claimant was not in attendance at her regular church services because she was required to work. While at work, she received a telephone call from her boyfriend advising her that the underground church was raided by the Public Security Bureau (PSB). The claimant immediately went into hiding. She subsequently learned that three members of her house church had been arrested and that the PSB attended her home to arrest her. Fearing she would be arrested, the claimant used the services of a smuggler to leave China for Canada where she filed for refugee protection.
>
> (Decision, para. 2)

[3] At the opening of the analysis of the evidence, the Member states that:

> The determinative issue in this claim is the credibility of the claimant's oral and documentary evidence in regard to her identity as a Christian. In this regard, the panel finds the claimant is not a credible witness.

In my opinion, three central findings that the Member identified as relating to the Applicant's credibility are made in reviewable error. Each is addressed below under the heading framed by the Member in the decision rendered.

I. Arrest of Fellow Church Members and Pursuit of Claimant by the PSB

[4] On this issue the Member finds as follows:

> The claimant alleges that three of her fellow church members were arrested and each received multi-year sentences. The claimant's testimony in this regard runs counter to the country condition documents that will be demonstrated later in these reasons with the analysis of the *Situation of Christians in Fujian Province.* In this regard, the panel draws a negative inference.

The claimant also alleges that the PSB have attended her home on numerous occasions with the intent of arresting her. The claimant

testified that on the first occasion, the PSB also searched her home. She also alleges that the PSB attended her home 3 days later and showed her parents a warrant for her arrest. Country Condition documents indicate that a summons is generally left with or shown to family members when the police want someone to come to their headquarters. In addition, the summons is the documentary basis for the subsequent issuance of an arrest warrant if the person in whom they are interested does not respond to the summons. The documentary evidence states in part:

> An arrest warrant can only be obtained with the approval of county level and above public security organs upon the presentation of an "application for Arrest-Summons". The application will state clearly and support with credible evidence that a crime has been committed, the person to be arrested-summoned for interrogation has been connected to the crime, and the suspect is not likely to appear voluntarily or that a summons for interrogation has been executed with no success.

The claimant has testified that the second time the PSB showed up at her house they showed a warrant to her family. According to the claimant's allegation, the PSB would not have known that she was not at her residence when they attended. If a warrant was issued as the claimant has alleged, then according to the country documents, the PSB would have had to provide credible evidence that the claimant was not going to attend voluntarily. Furthermore, the claimant has not alleged that a summons was left for her at her home. It does not seem plausible that the PSB would be able to provide that credible evidence given that they had not yet determined if the claimant was at home. In this regard, the panel draws a negative inference.

The panel prefers the evidence of the China country documentation in regard to the issuance of arrest warrants as this information is provided by unbiased, independent sources with no interest in the outcome of any particular refugee claim.

The notes that the claimant has provided any persuasive evidence to support her allegation that she is being pursued by the PSB. The only evidence she has provided is her testimony and the allegations she has made in her Personal Information Form (PIF).

(Decision, paras. 5 – 9)

[5] Thus, in the passage quoted the Member makes a negative credibility finding based on an implausibility finding based on what is understood to be a general practice of the PSB in China. In my opinion, this finding does not conform to the law and constitutes a reviewable error. The law with respect to the making of implausibility findings is very clear. Implausibility findings are required to follow a rigorous standard of proof as set out in the following passages from the decision in *Vodics v Minister of Citizenship and Immigration*, 2005 FC 783 at paragraphs 10 - 11:

> With respect to making negative credibility findings in general, and implausibility findings in particular, Justice Muldoon in *Valtchev v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1131, [at paragraph 7] states the standard to be followed:
>
> > The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the Maldonado principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions.
> >
> > A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. 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. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]
>
> [Emphasis added]
>
> It is not difficult to understand that, to be fair to a person who swears to tell the truth, concrete reasons supported by cogent evidence must exist before the person is disbelieved. Let us be clear. To say that someone is not credible is to say that they are lying. Therefore, to be fair, a decision-maker must be able to articulate why he or she is suspicious of the sworn testimony, and, unless this can be done, suspicion cannot be applied in reaching a conclusion. The benefit of any unsupported doubt must go to the person giving the evidence.

[6] Counsel for the Applicant adds confirmation to the finding just made by arguing that the Member did not refer to all the available evidence in establishing the general practice which is relied upon to make the implausibility finding:

> In support of its finding that the applicant would have received a summons before an arrest warrant, the panel cites a section of CHN42444.E. The panel fails to cite the following paragraph which occurs immediately after the one it cited:
>
> > However, in 21 April 2004 correspondence with the Research Directorate, the associate professor further noted that while procedural laws in China are expected to be uniformly implemented and concerted efforts have been made by the Ministry of Public Security to improve policing standards, in practice the "PSB [Public Security Bureau] has yet to arrive as a rule of law institution." <u>According to the associate professor, there can be substantial regional variances in law enforcement, in which some differences are written into policies, but "in most instances rule of the book gives way to norms in the street</u>" (21 Apr. 2004).
>
> The panel uses this documentary evidence selectively to support its conclusion.
>
> [Emphasis added]

> (Applicant's Memorandum of Argument, para. 16)

[7] With respect to Counsel for the Applicant's confirmation, Counsel for the Respondent replies:

> The Board was entitled to draw a negative inference from a lack of information in the documentation that might reasonably be expected to be mentioned in the circumstances.
>
> (Respondent's Memorandum of Argument, para. 9)

I reject this argument for two reasons. First, I find that there is no lack of information on the record about the practice of the PSB: it is variable. And second, the obligation on the Member to consider all the evidence in reaching such an important finding does not conform to the general law on fact finding:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
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> (*Cepeda-Gutierrez v. Canada (Minister of Citizenship & Immigration)*, [1998] F.C.J. No. 1425, at para. 7)

II. Identity as a Christian

[8] On this topic, the Member provides an opinion on two issues: whether the Applicant has requisite knowledge of Christian doctrine to prove she is a Christian; and whether the Applicant's claim in made in good faith.

A. *Knowledge of Christian Doctrine*

[9] A critical passage in the Member's analysis on this issue is as follows:

> The claimant was asked a number of questions concerning her religious knowledge. While she was able to demonstrate some knowledge, it was clear however, that she did not have a deep or meaningful understanding. The claimant was asked about the Holy Trinity. She described the Holy Trinity as the Holy Father, Jesus and the Holy Spirit. She was asked if Jesus was God. She responded that he was not God but the son of God. She was asked if the Holy Spirit was God. After some hesitation and repeating of the question several times, the claimant responded that the Holy Spirit was God. The claimant failure to understand that Jesus is God is very troublesome. A fundamental belief of Christianity is that Jesus is God. In this regard, the panel draws a negative inference. The claimant was asked to explain the Holy Trinity. The claimant responded by saying that Jesus Christ is the creator of mankind and the world and that Jesus, his son, was sent to earth to save mankind. The claimant correctly identified the Holy Spirit as the protector of mankind. The claimant's testimony that Jesus Christ is the creator of mankind and the world is inaccurate. A fundamental belief of Christians is that God, described as God the Father or God the Creator within the Holy Trinity, is the creator of the world and mankind. The panel draws a negative inference from the claimant's failure to know this fundamental belief. In addition, it is clear that the claimant does not know that the Holy Trinity is a concept of three divine persons in one. This too is a fundamental belief of Christianity and the panel draws a negative inference from the claimant's failure to know this.
>
> [Emphasis added]
>
> (Decision, para. 15)

[10] In *Zhang v Minister of Citizenship and Immigration*, IMM-2216-11 (2012 FC 503), for reasons which I incorporate by reference into the present decision, I have made the following finding at paragraph 16:

> Thus, the presumption that a person swears to be of a certain religious faith cannot be rebutted simply on the basis of his or her knowledge of that religion. First, religious knowledge cannot be equated to faith. And second, the quality and quantity of religious knowledge necessary to prove faith is unverifiable. Therefore, a finding of implausibility that a certain person is not of a certain faith because he or she does not meet a certain subjective standard set by a decision-maker is indefensible as a matter of fact.

[11] The danger of engaging in the practice of questioning on religion to determine whether a person is an adherent to the religion claimed is made strikingly clear in the decision under review. In my opinion, it is remarkably unfair for the Member to have engaged the Applicant in a debate on Christian theology as to whether Jesus is the Son of God or God, and to then make a negative credibility finding because the Applicant's understanding does not conform with what the Member understands is a fundamental belief of Christianity. First, there is no evidence on the record to support the Member's understanding, and second, differences of opinion, however found, about the interpretation of religious dogma cannot be the basis of finding someone is lying.

[12] Also in the decision in *Zhang*, on the basis of an analysis of the test respecting the making of implausibility findings as expressed in *Vodics* as quoted above which I incorporate by reference into the present decision, I have made the following finding at paragraph 20:

> […] Adapting the test to the making of implausibility findings with respect to religious questioning requires an RPD member to follow a three-part process: from evidence on the record find what might reasonably be expected by way of a response to a discrete question; fairly obtain an applicant's answer; and finally, conclude whether the answer conforms with what might be reasonably suspected. The key

> feature of the test is establishing what answer might be reasonably expected. This feature requires that a credible and verifiable evidentiary basis for the expectation has been established and known.

[13] Since the Member did not adhere to the law with respect to the making of implausibility findings on the issue presently under consideration, I find that the decision under review is made in error of law.

B. ***The Relevance of Good Faith***

[14] The finding of law made by the Member on this issue is as follows:

> Having found that the claimant was not a Christian in China, the panel must consider whether the claimant is a genuine practicing Christian in this country. There is a requirement for 'good faith' in making a refugee claim. In this regard, R.P.G. Haines, the Chairman of a refugee status appeal panel and A.G. Wang Heed, a member of the United Nations High Commission for Refugees stated in part:
>
> > If there is no good faith requirement in the sur place situation, it places in the hands of the appellant for refugee status the means of unilaterally determining the grant to him or her of refugee status.
>
> In this regard the panel cites the following from James Hathaway's The Law of Refugee Status with regard to "sur place" claims: An individual who as a stratagem deliberately manipulates circumstances to create a real chance of persecution, which did not exist, cannot be said to belong to this category/The panel finds, on a balance of probabilities that this claim has not been made in good faith.
>
> Having found that the claimant was not a genuine practicing Christian in China and having found that this claim has not been made in good faith, the panel finds, on a balance of probabilities, and in the context of findings noted above, that the claimant joined a Christian church in Canada only for the purpose of supporting a fraudulent refugee claim. In the context as noted above, and on the basis of the totality of evidence disclosed and in the context of the claimant's knowledge of Christianity, the panel finds that the claimant is not a genuine practicing Christian, nor would she be perceived to be in China.

> [Footnote omitted]
>
> (Decision, paras. 19 – 20)

[15] In *Hu v Minister of Citizenship and Immigration*, IMM-6232-11 (2012 FC 544), for reasons which I incorporate by reference into the present decision, I have made the following finding at paragraph 14 with respect to exactly the same statement of the law by the Member as quoted above:

> […] The passages disclose that by disbelieving the Applicant's evidence with respect to what occurred in China, the Member understood that, as a matter of law, a concept of "good faith" was engaged which allowed the dismissal of the Applicant's *sur place* claim as a Christian in Canada. I find that the passages disclose an erroneous finding of law. In my opinion, the Member's statement that the "good faith" finding is made in the context of other negative findings does not diminish the application and impact of the erroneous finding of law.

As a result, I find that the decision presently under review is made in error of law.

III. Situation of Christians in Fujian Province

[16] At paragraph 21 of the decision under review, the Member makes the following finding:

> Having found that the claimant was not a genuine practicing Christian in China and having found that this claim has not been made in good faith, the panel finds, on a balance of probabilities, and in the context of findings noted above, that the claimant joined a Christian church in Canada only for the purpose of supporting a fraudulent refugee claim. In the context as noted above, and on the basis of the totality of evidence disclosed and in the context of the claimant's knowledge of Christianity, the panel finds that the claimant is not a genuine practicing Christian, nor would she be perceived to be in China.

Then at paragraph 22, the Member makes the following statement:

> Notwithstanding the foregoing determination, in the alternative, the panel has considered whether there is a serious possibility that the claimant would be persecuted if she returns to China and chooses to practice Christianity in an unregistered church. The panel is guided by the Country Condition Documents in evidence. The claimant is from Fujian province. The panel notes the documentary evidence states that Fujian and Guangdong have "the most liberal policy on religion in China, especially on Christianity" (Executive Secretary 1 Sept. 2005a). (ibid.).

[17] The Member used the same form of decision making in *Hu*, which resulted in me making the following finding at paragraph 17 of the review decision rendered :

> The Applicant claims protection based on his evidence that he is a Christian. The Member disbelieved him, and used the legal concept of good faith, to dismiss his claim. As found in paragraph 13 above, the concept of "good faith" has no relevance to the Applicant's claim; it is an issue that arises in a claim based on a factual finding that there is not, and never was, a heart to the claim because it is based in fraud. But, apart from this error in law, the negative credibility finding remains a key element of the Member's decision. The Member found as a fact that the Applicant "is not a genuine practicing Christian, nor would he be perceived to be in China". In my opinion, this statement completely concludes the determination of the Applicant's claim; there is nothing more to say. This is so because there is no fact base upon which to consider the possibility of persecution or probability of risk to the Applicant should he return to China. But, nevertheless, the Member proceeds to conduct an alternative analysis in case the Applicant chooses to continue to practice Christianity in an unregistered church in China. The statement is illogical: how can the Applicant continue to practice Christianity when he has been found not to be a Christian? For these reasons, I find that the Member's "notwithstanding" effort is purely hypothetical, and, therefore, irrelevant. […]

[18] I repeat this finding in the present reasons to conclude that the Member's alternative finding is irrelevant. However, I think it is only fair to address Counsel for the Applicant's detailed direct challenge to the Member's attempt to establish, on "current" in-country evidence, that the Applicant "would be able to practice her religion in any church in Fujian province if she were to return to her

home in Fujian province in China and that there is not a serious possibility that she would be persecuted for doing so" (paragraph 32).

[19] The Member's conclusion is based on a purported evaluation of current evidence of conditions for Christians in Fujian province. On this evaluation, the Member found that: there were no mention of arrests of Christians in Fujian in 2007 and 2008; no evidence of recent arrests (paragraph 23 and 24); and if there were recent arrests of Christians in Fujian province, there would be some documentation of these arrests (paragraph 26).

[20] Counsel for the Applicant's challenge is as follows:

> The panel considers the situation of Christians in the Fujian province. The panel begins its analysis by selecting one quote from the documentary evidence about Fujian. That quote is the following:
>
> > Fujian and Guangdong have "the most liberal policy on religion in China, especially on Christianity" [2005]
>
> The panel footnotes this citation to item 12.8 of the package, CHN100386.E. In fact, 12.8 of the NDP is not this I1EFTNFO. Indeed CHN100386.E is not part of the April 2011 package which was entered into evidence on this case. This information is part of an earlier package from 30 July 2010 dealing with the situation of Catholics (the applicant is not Catholic). It was deleted from the package that was before the Board for this case. This is an error on the part of the Board.
>
> In fact, there is a much more recent REFINFO (30 June 2010) right on the subject of the treatment of Christians in Fujian and Guangdong. It states the following:
>
> > Guangdong and Fujian
> >
> > Information on the specific situations of Protestants in Guangdong and Fujian provinces was scarce among the sources consulted by the Research Directorate. In

> the 9 June 2010 telephone interview with the Research Directorate, the President of the CAA stated that east coast provinces are generally "more open" with fewer incidents involving Christians reported to the CAA (CAA 9 June 2010). However, the CAA President also stated that this did not necessarily mean there were fewer incidents, but rather that they were not reported (ibid.). In addition, in a letter provided to the Research Directorate, originally sent to a Canadian asylum lawyer on 3 June 2010, the President stated:
>
> With specific reference to the provinces Fujian and Guangdong, it is absolutely incorrect to find that there is religious freedom in these provinces. [...] [The persecution may come and go and not be totally predictable, but it is always present. Even the very threat of a government crackdown is a method of persecution. The house churches in Fujian and Guangdong, like all of China, face the constant and fearful risk of being closed and its members punished. Certainly, these provinces do not enjoy religious freedom while all other parts of China do not. (ibid. 3 June 2010) According to annual reports by the CAA, in 2007 there were two cases of "persecution by authorities involving 4 people in Guangdong province (CAA Feb. 2008, 13), one incident involving more than 60 people in 2008 (ibid. Jan. 2009, 18) and eight incidents involving over 300 people in 2009 (ibid. Jan 2010, 22). The CAA also reports that a house church in Pingtan in Fujian province was demolished in 2006 (ibid. Jan. 2007, 13).

This part of the documentation package goes completely without notice or citation by the panel in this case. This is selective use of documentary evidence.

The RPD considers the most recent China Aid Association Report from March of 2011. This report states that more than 10 persons were reliably found to have been persecuted in the Fujian province in 2010. This fact flies in the face of the panel's statements that there is no documented persecution in Fujian. The CAA report also notes that that its information only pertains to reported incidents and should not be understood as actual numbers of incidents due to the many problems of obtaining reliable data.

> The panel states that there is no information how these persons were persecuted or why the churches were sealed, and still insists that it is clear that no one was arrested or sentenced for underground activities. In so doing, the panel interprets the report in exactly the way the CAA report expressly states it is NOT to be interpreted.
>
> In fact the panel again commits an error on the face of the record in stating that no information is available in the CAA report about the persecution and that is not even clear if it is a legal or an illegal church. The CAA report dealing with these persecutions in the Fujian province contains a direction with a link to a news report for more information about the raid it refers to. When one accesses this link the following information is available:
>
> > FUJIAN — On the morning of October 17, 2010, church leaders in Lianjiang County, Fuzhou City sent a text message asking various churches for prayer and assistance. At 9:30 a.m., Ban Kezhen, a fellow worker, was taken away by government agents who did not show identification. Also, three venues that arc used for church gatherings have been sealed without any legal basis or submitting government paperwork. The personal website of He Keduan, the church leader, has been restricted.
>
> The panel makes an erroneous reading of the documentary evidence and draws the conclusion that "if there were arrests there would be reports of these arrests" which flies directly in the face of the documentary evidence the Board is considering which states that its information is limited by the restrictions on reporting like the one noted in this incident where the church leader's website was restricted preventing him from providing further information.
>
> [Emphasis added]
>
> (Applicant's Memorandum of Argument, paras. 8 - 15)

[21] On the basis of this argument it is easy to find that the Member's conclusion is unsupported by current in-country evidence.

[22] I have two comments to make about the notion that because there is no evidence of arrests, there were no arrests. This type of conclusion has been validated in the following decisions: *Yang, Si v Minister of Citizenship and Immigration*, 2010 FC 1274; *Nen Mel Lin v Minister of Citizenship and Immigration*, IMM-5425-08; *Jiang v Minister of Citizenship and Immigration*, 2010 FC 222; *Yao, Gong Sao v Minister of Citizenship and Immigration*, 2011 FC 902). My first comment is that reaching such a conclusion depends on a review of all the available current in-country evidence in a given case. Because current evidence is so crucial to support a finding of safety upon return, in my opinion a determination on evidence in a past decision of the Court has no precedential value. My second comment is that, determining the possibility of persecution or probability of risk upon return on a narrow finding about the probability of being arrested for practicing religion, offends the human dignity and human rights of a claimant. The issue to be determined is whether upon return a claimant can enjoy religious freedom (see: *Zhou, Guo Heng v MCI*, 2009 FC 1210 at para. 29; and *Fosu v MCI*, [1994] FCJ No 1813, para. 5).

IV. Result

[23] For the reasons provided, I find that the decision under review is not defensible in respect of the facts and the law.

ORDER

THIS COURT ORDERS that:

1. The decision under review is set aside and the matter is referred back for redetermination before a differently constituted panel.

2. There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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