

Federal Court



Cour fédérale

Date: 20120504

Docket: IMM-6232-11

Citation: 2012 FC 544

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

SHAO RONG HU

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 he be required to return to China he 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 his claim on what is argued by the Applicant to be a highly contentious legal finding by the Refugee Protection Division member concerned, Mr. L. Favreau.

[2] The Applicant's claim for protection is based on his evidence that he is a Christian who practiced his religion both in China prior to fleeing for Canada, and subsequently in Canada. The circumstances of making his claim are stated by the Member as follows:

The claimant alleges that he was first introduced to Christianity by a friend in September 2007. The friend suggested Christianity to the claimant because he recognized that the claimant was feeling depressed due to *his* failed relationships. The claimant began to regularly attend underground services beginning in late September 2007. In August 2008, the claimant was at his underground house church service when it was raided by members of the Public Security Bureau (PSB). The claimant managed to escape and immediately went into hiding. The claimant alleges that PSB attended his home in search of him. The PSB told his parents that they had arrested four fellow members of the church and demanded that the claimant turn himself in. Fearing that he would be arrested, the claimant used the services of a smuggler to leave China for Canada where he filed for refugee protection.

(Decision, para. 2)

[3] However, in the decision under review the Member made the global negative credibility finding that, not only was the Applicant not a Christian in China as he alleged, but that this element of his claim was made only for the purpose of supporting a fraudulent claim (paragraph 15). This finding is based on five factors: an inconsistency in the Applicant's testimony (paragraph 11); no persuasive documentary evidence to support the allegation that the Applicant is being pursued by the PSB in China (paragraph 12); the fact that the PSB did not leave or show his parents a summons or a warrant when they attended the family home (paragraph 13); the Applicant's evidence that his house church was raided and four members were arrested and incarcerated "is neither plausible nor credible" with respect to Guangdong Province; and "it is reasonable to expect that a person with the

religious profile of the claimant would have a deeper and more substantial understanding of the core beliefs of Christianity” (paragraph 7).

[4] While Counsel for the Applicant challenges the global negative credibility finding, the primary focus of the present review is the Member’s finding that since the Applicant was found to be fraudulent in maintaining to be a Christian in China, he is unable to establish his “good faith”, which is said to be essential to making a *sur place* claim as a Christian in Canada. Counsel for the Applicant argues that this finding is based in a misunderstanding of the law, and is an error in law. Since I agree with this argument for the reasons that follow, I find it is not necessary to address the substance of the negative credibility finding in order to set the present decision aside.

[5] The Member’s statement of the law in the decision under review is as follows:

[...] 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 [Refugee Status Appeals Authority (New Zealand), Refugee Appeal No. 2254/94, RE: HB September 21, 1994. (www.Nzrefugeeappeals.govt.nz/pdfs/ref_19940921_2254.pdf)].

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 [Hathaway, James, *The Law of Refugee Status*, (1991)].

Having previously found the claimant’s testimony with regard to his religious affiliation in China untrustworthy, the panel finds, on a balance of probabilities, and in the context of all of the findings and

negative inferences drawn above, that his claim has not been made in good faith.

Having found that his claim has not been made in good faith, the panel finds, on a balance of probabilities, and in the context of the 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 he be perceived to be in China.

(Decision, paras. 16 - 19)

[6] Justice Zinn in *Huang v Minister of Citizenship and Immigration*, 2012 FC 205 at paragraph 29 addressed a similar statement and made two obiter comments: the passage cited as a quotation from Professor Hathaway's text is not from that source but from the New Zealand decision (see: http://www.unhcr.org/refworld/country,,NZL_RSAA,,IRN,,3ae6b6910,0.html); and Professor Hathaway's view as expressed in his text does not appear to support the Member's conclusion. Given that Counsel for the Applicant argues that Canadian refugee law does not have a good faith requirement imposed on *sur place* claims, I find that to bring clarity to the law to and to properly address the Member's interpretation of the law, it is necessary to conduct a detailed analysis of the principles which govern *sur place* claims and then to address how the principles are relevant to the claim under consideration in the present Application.

[7] With respect to the principles, the analysis has three components.

[8] First, since the Member relies on an isolated statement of Professor Hathaway's in *The Law of Refugee Status* (Toronto, Butterworths, 1991), that statement must be considered in context. The

following passages from that resource at pages 29 to 39 provides a full contextual understanding of the concept of *sur place* claims:

The first element of Convention refugee status is that the claimant must be outside her country of origin.

[...]

The Convention refugee definition does not distinguish between persons who flee their country in order to avoid the prospect of persecution and those who, while already abroad, determine that they cannot or will not return by reason of the risk of persecution in their state of nationality or origin. By virtue of its requirement that the claimant" is outside the country of his nationality..." the Convention protects refugees *sur place* on an equal footing with those who cross a border after the risk of persecution is already apparent. This position is consonant with the general rule that the territorial requirement of the Convention definition is intended to identify those involuntary migrants within the effective reach of international law: whether already present or arriving in a foreign state, the refugee claimant is clearly able to benefit from protection against return.

The classic *sur place* refugee claim derives from a significant change of circumstances in the country of origin at a time when the claimant is abroad for reasons wholly unrelated to a need for protection. At the time of departure from her state, she may have intended only to vacation, study, or do business abroad, and then to return home. If, however, events subsequent to her departure would put her at risk of serious harm upon return home, she may claim protection as a Convention refugee.

[...]

A variant of the classical *sur place* situation involves the dramatic intensification of pre-existing factors since departure from one's home country. While distinguishable from the first category by the fact that the claimant may have been aware of, or even motivated to depart by, disturbing events in her home country, these cases are characterized by an escalation of events post-departure which is sufficient to give rise to a reasonable risk of persecution upon return.

[...]

In addition to claims grounded in either new circumstances or a dramatic Intensification of pre-existing conditions in the country of origin, a *sur place* claim to refugee status may also be based on the activities of the refugee claimant since leaving her country. International law recognizes that if while abroad an individual expresses views or engages in activities which jeopardize the possibility of safe return to her state, she may be considered a Convention refugee. The key issues are whether the activities abroad are likely to have come to the attention of the authorities in the claimant's country of origin and, if so, how they are likely to be viewed and responded to.

[...]

Because persons might engage in oppositional activity strictly or primarily with the intention of placing themselves at risk, there is concern that such claims present a clear opportunity for abuse by persons who are not really in need of protection. [Footnote: Bootstrap refugees are people who had no problem in their home country before they left, but left anyway, came here and decided they wanted to stay. In most blatant form, boot- strap refugees are those who, having decided they want to stay here, then issue a statement denouncing the home government, which they promptly use as the basis of their asylum application. Surely, they argue, if the government hears about this. it will persecute us when we get home": D. Martin in C. Sumpter, "Mass Migration of Refugees - Law and Policy" (1982), 76 A.S.I.L.P. 13, at 15].

Such an absolutist preoccupation with the possibility of fraud ignores the basic right of all persons to be free to express themselves, to associate with whomever they wish, to pursue the development of their own personalities;" Logically, visitors from abroad who exercise their right to speak out against their home government, who associate with opposition emigrant groups, Of who otherwise engage in lawful activity perceived by their state of origin to be inappropriate should be protected from return where there is a serious risk of persecution as a result of those actions." Since the voluntary issuance of the challenge to the home state is clearly lawful in and of itself, any reticence to acknowledge the validity of a claim to protection in such circumstances "chills an alien's constitutionally protected freedom of expression."

[...]

In the case of persons who have chosen to be politically active in their state of origin, the authenticity of the political opinion

underlying the activism is generally assumed. This is sensible, because an individual would be unlikely to make insincere attacks on her state at a time when she remains within its grasp. The ability of the state to exert control and to punish is an implied barometer of authenticity. In contrast, an individual *outside* the jurisdiction of her state of origin may be subject to no such automatic and effective control mechanism. It is thus more readily conceivable that an oppositional stance could be assumed simply for the purpose of fabricating a claim to refugee status [see Footnote below] and thus not reflect a political opinion as required by the definition. The challenge, then, is to respond to this real evidentiary difference without being dismissive of such protection needs as may arise from the expression of sincerely held convictions at a time when an individual is abroad.

[Footnote from above: "Asylum law protects those who *in good faith* need to be sheltered from persecution. This protection was not meant to encompass those who make political statements for the sole purpose of becoming refugees" (Emphasis added): K. Petrini, "Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim" (1981), 56 Notre Dame Lawyer 719, at 729.]

It does not follow, however, that all persons whose activities abroad are not genuinely demonstrative of oppositional political opinion are outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad.

This issue is most poignantly raised when it is alleged that the fact of having made an unfounded asylum claims may *per se* give rise to a serious risk of persecution. While these cases provide perhaps the most obvious potential for "bootstrapping", there must nonetheless be a clear acknowledgment and assessment of any risk to basic human rights upon return which may follow from the state's imputation of an unacceptable political opinion to the claimant. The *mere* fact that the claimant might suffer some form of penalty may not be sufficiently serious to constitute persecution, but there are

clearly situations where the consequence of return may be said to give rise to a well-founded fear of persecution. For example, in *Slawomire Krystof Hubicki* evidence was adduced that under then-prevailing Polish criminal law, the claimant would face imprisonment of up to eight years because he had made a refugee claim in Canada. In such situations, the basis of claim is not the fraudulent activity or assertion itself, but is rather the political opinion of disloyalty imputed to the claimant by her state. Where such an imputation exists, the gravity of consequential harm and other definitional criteria should be assessed to determine whether refugee status is warranted.

[Footnotes omitted except where noted] [Emphasis added]

[9] Second, with respect to religious conversion abroad as grounding a claim for protection, the UNHCR document “Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees”, dated April 28, 2004, addressed by Counsel for the Respondent at the hearing of present Application, speaks to key considerations in paragraphs 34 to 36:

Where individuals convert after their departure from the country of origin, this may have the effect of creating a *sur place* claim. In such situations, particular credibility concerns tend to arise and a rigorous and in depth examination of the circumstances and genuineness of the conversion will be necessary. Issues which the decision-maker will need to assess include the nature of and connection between any religious convictions held in the country of origin and those now held, any disaffection with the religion held in the country of origin, for instance, because of its position on gender issues or sexual orientation, how the claimant came to know about the new religion in the country of asylum, his or her experience of this religion, his or her mental state and the existence of corroborating evidence regarding involvement in and membership of the new religion.

Both the specific circumstances in the country of asylum and the individual case may justify additional probing into particular claims. Where, for example, systemic and organized conversions are carried out by local religious groups in the country of asylum for the purposes of accessing resettlement options, and/or where “coaching” or “mentoring” of claimants is commonplace, testing of knowledge is of limited value. Rather, the interviewer needs to ask open questions

and try to elicit the motivations for conversion and what effect the conversion has had on the claimant's life. The test remains, however, whether he or she would have a well-founded fear of persecution on a Convention ground if returned. Regard should therefore be had as to whether the conversion may come to the notice

of the authorities of the person's country of origin and how this is likely to be viewed by those authorities. Detailed country of origin information is required to determine whether a fear of persecution is objectively well-founded.

So-called "self-serving" activities do not create a well-founded fear of persecution on a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned. Under all circumstances, however, consideration must be given as to the consequences of return to the country of origin and any potential harm that might justify refugee status or a complementary form of protection. In the event that the claim is found to be self-serving but the claimant nonetheless has a well-founded fear of persecution on return, international protection is required. Where the opportunistic nature of the action is clearly apparent, however, this could weigh heavily in the balance when considering potential durable solutions that may be available in such cases, as well as, for example, the type of residency status.

[Footnotes omitted] [Emphasis added]

[10] And third, the legal principles emphasized in the passages quoted from Professor Hathaway's survey and in the UNHCR document are to be applied with an overarching expectation that claimants for protection will be truthful. As advanced by Counsel for the Respondent in the present Application, s. 16 of the *IRPA* clearly establishes this requirement:

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

[11] The next step in the analysis is to determine the relevance of the principles to the Applicant's claim for protection as determined by the Member.

[12] The Applicant produced a claim for protection as a Christian. His narrative describes that he: practiced the religion in China; went into hiding in China after the PSB raided his house church; fled to Canada; continued to practice his religion in Canada; and made his claim. It is not contested that there is a history of persecution of Christians in China. In these circumstances, the Applicant's claim can properly be considered a *sur place* claim. It is a straightforward claim that requires evaluation on the evidence presented.

[13] It is clear from a review of the principles of refugee law just conducted that the use of the phrase "good faith" is directly linked and limited to the principle that, even if a person makes a fraudulent claim for protection while abroad, protection might still be granted if the authorities in his or her country of origin would act against her or him upon return just because of the fact of making the claim. On this basis, I find that the concept of "good faith" has no relevance to the Applicant's claim. There is no direct evidence that the Applicant concocted a fraudulent claim as a convert to Christianity in Canada; and there is no evidence that the authorities in China would consider that the Applicant had concocted a fraudulent claim in Canada, resulting in adverse consequences to him simply on this basis if he returns to China.

[14] While it was open to the Member to make a negative credibility finding on elements of the Applicant's claim upon considering the whole of evidence, and to dismiss the claim accordingly, this was not the approach applied. I find that the Applicant's claim was dismissed because the Member misunderstood and misapplied the phrase "good faith" as it is expressed in the law. It bears repeating that the decision turns on the following passages:

There is a requirement for 'good faith' in making a refugee claim.

[...]

Having previously found the claimant's testimony with regard to his religious affiliation in China untrustworthy, the panel finds, on a balance of probabilities, and in the context of all of the findings and negative inferences drawn above, that his claim has not been made in good faith.

Having found that his claim has not been made in good faith, the panel finds, on a balance of probabilities, and in the context of the 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 he be perceived to be in China.

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.

[15] Counsel for the Respondent argues that, nevertheless, the Member's decision can be salvaged on acceptance of the following argument:

The jurisprudence from *Ejtehadian v The Minister of Citizenship and Immigration* [2007 FC 158 at para.11], *Ghasemiam v Canada (MCI)* [2003 FC 1266] and *Mohajery v Canada (MCI)*, [2007 FC 185] states that even where an applicant's motivation is not made in good faith, the tribunal is obliged to still assess whether the applicant would face persecution upon return.

The RPD stated that notwithstanding its determination of whether the Applicant's claim was made in good faith, it did recognize that refugee laws are forward looking. The RPD followed the principle from the decision in *Ejtehadian* and went on to consider the merits of the Applicant's *sur place* claim if he were to return to practise Christianity in Guangdong Province.

(Respondent's Further Memorandum, paras. 4 and 5)

[16] To properly assess Counsel for the Respondent's argument, it is necessary to consider the Member's statements as quoted in paragraph 14 above, together with those made immediately after under the heading "Situation of Christians in Guangdong Province":

Notwithstanding the foregoing determination, the panel recognizes that refugee laws are forward looking. In this regard, the panel has considered whether there is a serious possibility that the claimant would be persecuted if he chooses to continue to practice Christianity in an unregistered church in China.

[Emphasis added]

(Decision, para. 20)

[17] 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. Therefore, given the substance of the Member's decision, I dismiss Counsel for the Respondent's argument.

[18] Counsel for the Respondent poses the following question for certification:

Is it a reviewable error if the RPD takes into consideration whether an applicant's claim for protection is made in good faith if the RPD continues to assess the merits of the *sur place* claim?

And in response, Counsel for the Applicant poses the following question for certification:

Is good faith determinative of a *sur place* claim in Canadian law?

[19] Given the conclusions reached on the present Application, since neither question posed is determinative of the present Application, I find that both questions are not suitable for certification.

ORDER

THIS COURT ORDERS that:

1. The decision under review is set aside and the matter is referred back to a differently constituted panel for redetermination.
2. There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: SHAO RONG HU
v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

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