

Federal Court



Cour fédérale

Date: 20130308

Docket: IMM-5710-12

Citation: 2013 FC 256

Ottawa, Ontario, March 8, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ZHEN XIANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated May 15, 2012, where the Board determined that the applicant is not a Convention refugee or person in need of protection.

I. Background

[2] The applicant alleges the following facts in support of her application.

[3] The applicant claims she is from the Fujian province in the People's Republic of China [China]. She alleges that she was depressed after discovering her husband's infidelity in December 2008 and that a friend introduced her to Christianity in order to help her. She claims she attended her first house church service on February 15, 2009, became a regular attendee every Sunday night along with 32 others, and was baptized in China on January 10, 2010.

[4] The applicant alleges that on September 29, 2010, the Public Security Bureau [PSB] raided her church and she went into hiding at her cousin's home. She claims that while she was in hiding, she learned that the PSB went to her home two days later. They allegedly accused her of being involved in illegal underground church religious activities and of being a key member of an anti-government cult. She claims they also mentioned they had arrested some of her fellow believers. They allegedly proceeded to search the applicant's home and interrogate her family members. The applicant claims that the following day, they left a summons for her arrest at her home, and also went to her parents', in-laws' and brother's homes to look for her.

[5] Feeling unsafe in China, the applicant decided to come to Canada. She arrived in Canada on November 17, 2010 and claimed refugee status on November 22, 2010. She attempted to contact her fellow believers in China but was unsuccessful, and she has no other information about the believers who were allegedly arrested. She claims the PSB have continued to visit her home several times.

[6] At the hearing, the Board produced enlargements of the photo on the applicant's Resident Identity Card [RIC] and the photo Citizenship and Immigration Canada [CIC] took of the applicant when she applied for refugee protection [the CIC photograph].

[7] The determinative issue for the Board was that it could not determine the applicant's personal identity or that she was a citizen of China. The Board reviewed the five documents the applicant submitted to establish her identity: a second generation RIC, a Household Register [Hukou], a marriage certificate, an arrest summons, and a business license.

[8] The Board did not question the authenticity of the RIC, but concluded that on a balance of probabilities, the RIC did not identify the applicant. The Board stated that as an RIC is the most important document to establish the applicant's identity as a national of China, it drew a negative inference in regard to the applicant's credibility. The Board based its finding on the RIC on the following considerations:

- The applicant did not know the correct age for when the RIC is issued to a Chinese citizen;
- The applicant was not able to accurately describe the basic colour, structure and uses of the RIC;
- The individual shown in the photograph on the RIC did not appear to have similar features to the photograph of the applicant taken at the time of her application for refugee protection, particularly obvious differences in regards to shape of the face, nose, and ears, as well as hairline and eyebrows, and the Board was not satisfied with the applicant's explanation that she had gained over ten pounds;

- Documentary evidence on the RIC indicated that genuine cards can be fraudulently obtained.

[9] The Board also found that the authenticity of the Hokou was questionable and accordingly gave it little weight as an identity document. The Board stated that its findings with respect to the RIC negatively impacted the authenticity of the applicant's Hokou given that the Hokou bore the claimant's alleged RIC number. The Board also noted that the only other documentation the applicant provided that contained her photograph was her marriage certificate, for which the corner containing her photograph had been torn. The photograph was allegedly torn by the applicant when she learned of her husband's infidelity. The Board also considered documentary evidence stating that counterfeit Hokou booklets are common and can be purchased easily on the black market.

[10] The Board gave no weight to the other identity documents because they did not have any photographs on them.

[11] Accordingly, the Board found that the applicant had failed to produce sufficient credible documents and evidence to establish her identity as a national of China, and had not satisfactorily explained why they were not provided. The Board found that as the applicant had knowingly submitted false documents, she was not a credible witness and the credibility of her entire account was cast into serious doubt. The Board concluded that as the applicant's identity had not been established, there was no need to analyze the rest of the evidence of the claim.

II. Issues

[12] The applicant raised the following issues:

- A. Did the Board breach the duty of procedural fairness by failing to provide the applicant with reasonable notice of its concern that the photograph contained in the applicant's RIC did not depict her?
- B. Did the Board erroneously conflate the issue of the applicant's personal identity with her nationality?

III. Standard of review

[13] It is well-established that the appropriate standard of review for issues of procedural fairness is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). As such, no deference is owed to the Board on the first issue (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50).

[14] The Board's conclusion regarding the applicant's identity is exclusively fact-driven, and is therefore reviewable on the reasonableness standard (*Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 743 at para 5 [*Su*]). Accordingly, with respect to the second issue, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

IV. Analysis

A. *Did the Board Breach the Duty of Procedural Fairness by Failing to Provide the Applicant with Reasonable Notice of its Concern that the Photograph Contained in the Applicant's RIC did not Depict her?*

[15] While the applicant was aware that her identity would be an issue at the hearing, the Board's screening form indicated that only "Affiliation: Political/Religious/Social/Family" would be an issue to the claim (page 40 of the Tribunal Record). On the screening form, no other subordinate boxes were checked off under the heading of "Identity", such as the applicant's "Civil Status (*name, date & place of birth, marriage*)" or "Country(ies) of Reference (*Citizenship, multiple nationality, residency status, statelessness*)". Notwithstanding that the photograph at issue (the RIC photograph) was provided by the applicant herself to the Board, the Board had a duty to notify the applicant of its concerns about the photographic inconsistencies prior to the hearing. The applicant's ability to deal with issues concerning her identity raised by the Board during the hearing was compromised by the Board's failure to notify the applicant on the screening form that there were inconsistencies in the photographs that would end up being determinative of the decision.

[16] As Justice Russell Zinn pointed out in *Lin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 108 at para 31:

I reject this submission entirely. I accept the submission of the respondent that when, on this form, a main box is checked, such as Credibility, but none of the subordinate boxes under that heading are checked, it puts the applicant on notice that all of the issues in the unchecked subordinate boxes are at issue. It is only when some of the subordinate boxes are checked and some not that the applicant is alerted that those unchecked under the heading are not at issue.

[17] The Board was therefore procedurally unfair in not alerting the applicant prior to the hearing that her photographic inconsistencies would be an issue with respect to confirming her identity.

[18] Moreover, the Board also failed to disclose prior to the hearing that blown-up copies of the applicant's photographs would be put to her to question her identity. As Justice Gibson stated in *Nrecaj v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 630 at paras 22-23:

But sharing of the interview notes was provided in this case at the resumed hearing on April 13, 1992. Did that meet the obligation that I find to exist on the RHO and the CRDD? The short answer is, "no". To adequately meet the test of fairness, disclosure must be timely. It must be sufficiently timely to allow counsel to fully and effectively fulfill his or her role and to allow the party requesting disclosure to prepare. In this case, that obligation was not met.

It was argued before me by counsel for the respondent that the hearing notes and the contradiction in the applicant's testimony that they were used to establish were not critical to the CRDD's decision; that without their use and the establishment of the particular contradiction, the decision would have been the same. That is not for me to speculate on. It is sufficient that I find a breach of fairness, as I do, to justify referring this matter back for rehearing. It will be for another panel of the CRDD to determine the impact of a remedying of that breach.

[19] Accordingly, I find the Board's decision procedurally unfair.

[20] Counsel for the applicant requested the following question to be certified: Is it a breach of natural justice and/or procedural fairness for the RPD to determine a claim for refugee protection on the basis of an issue not identified on the screening form?

[21] I do not consider this to be of significant general importance to so certify the question.

B. *Did the Board Erroneously Conflate the Issue of the Applicant's Personal Identity with her Nationality?*

[22] I find no legitimate basis for the applicant's argument on this issue. Justice Judith Snider articulated the proper approach to the issue in *Su v Canada (Minister of Citizenship and Immigration)*, 2012 FC 743 at para 3:

Proof of identity is a pre-requisite for a person claiming refugee protection as without it there can "be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant's true nationality" (*Jin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26, [2006] FCJ No 181 (QL); see also *Liu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 831 at para 18, [2007] FCJ No 1101 (QL)).

[23] While the Board here did not undertake an analysis of the applicant's true nationality independent of its determination that the applicant's identity was not established, following *Su*, above, there would have been no sound basis for the Board to do so. Therefore, in my opinion, the Board did not err by failing to analyze the applicant's nationality independent of its identity finding.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The applicant’s application for judicial review is allowed, and the matter is referred to a different Board member for redetermination;

“Michael D. Manson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5710-12

STYLE OF CAUSE: Xiang v. MCI

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 7, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** MANSON J.

DATED: March 8, 2013

APPEARANCES:

Jayson Thomas

FOR THE APPLICANT

Monmi Goswami

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levine Associates
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada

FOR THE RESPONDENT