Date: 20080408

Docket: IMM-3342-07

Citation: 2008 FC 450

Toronto, Ontario, April 8, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

HANQUAN LIANG

AN LI OU (a.k.a. ANLI OU)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated July 24, 2007, wherein the Applicants' were found not to be Convention refugees nor persons in need of protection.

BACKGROUND

[2] The Applicants, a husband and wife, are citizens of the People's Republic of China aged 76 and 65 respectively.

[3] In September 2001, the Applicants' daughter was accused of Falun Gong activities in China. She subsequently claimed and was granted refugee status in Canada in 2002.

[4] Beginning in September 2001, the Applicants allege the following occurrences, all stemming from their daughter's implication in Falun Gong activities:

- The Public Security Bureau (PSB) questioned them regarding their daughter's whereabouts and her Falun Gong activities.
- The PSB threatened to stop their pensions, cut off their electricity, and deny them health care.
- Their eldest son was dismissed from his job.
- The male applicant, after being hospitalized in 2004, was forced to pay medical expenses in the amount of approximately 20 000 Renminbi (RMB) that would ordinarily have been covered by his work unit.

[5] The Applicants suffer from a variety of health problems which they allege are exacerbated by their situation in China, including multiple chronic disorders of the heart and blood, high blood pressure, and anxiety.

[6] The Applicants arrived in Canada on May 28, 2005 and claimed refugee protection on May 30, 2005.

[7] In a decision dated July 24, 2007, the Board found that the Applicants were neither Convention Refugees nor persons in need of protection pursuant to s.96 and s.97 of the Act.

[8] The Board accepted the Applicants' allegations but concluded that the pattern of harassment which they had been subjected to did not amount to persecution. More particularly, the Board noted that there was no evidence indicating that the PSB threatened the Applicants with interrogation, arrest or incarceration. There was also no evidence that the Applicants were under any form of surveillance, or that their liberty was restricted in any way. Further, the Applicants were able to obtain passports without difficulty: before arriving in Canada in 2005, the female applicant traveled to Canada in 2002, and the male applicant traveled to Hong Kong, Malaysia, and Singapore in 2005.

[9] Despite threats made by the PSB, there was no evidence, beyond the one instance of non-payment of the male applicant's medical expenses, that the Applicants suffered any economic deprivation.

[10] The Board indicated that the Applicants fear relates to ongoing discrimination and harassment, not persecution. Further, given that their daughter was in Canada with no intention of returning to China, the interest of the PSB will, more likely than not, diminish over time.

[11] The Applicants raised a number of issues in their memorandum of fact and law; however, for the purposes of the present judicial review, the most relevant is whether the Board erred in

concluding that the discrimination and harassment suffered by the Applicants did not amount to persecution.

STANDARD OF REVIEW

[12] It has long been held that "the identification of persecution behind incidents of discrimination or harassment is not purely a question of fact but a mixed question of law and fact, legal concepts being involved" (*Sagharichi v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 796 (QL), at para. 3) and is reviewable on the standard of reasonableness *simpliciter* (*Herczeg v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 2000, [2007] F.C.J. No. 1434 (QL), para. 17; *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1256, [2006] F.C.J. No. 1580 (QL), at para. 29).

[13] In light of the recent shift in the law of judicial review in Canada, as set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, there are now solely two standards of review: reasonableness and correctness. Instructively, the Supreme Court of Canada indicated the following as a guide to determine the appropriate standard of review:

> […] questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues however, attract the more deferential standard of reasonableness. (at para. 51).

[14] Further, at para. 62, the Court highlighted that the process of judicial review occurs in two stages:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[15] Thus, based on the prior jurisprudence and the nature of the question as one of mixed fact and law, I am of the view that the standard of review applicable to the issue of whether discrimination or harassment amounts to persecution is reasonableness. Pursuant to this standard, the analysis of the Board's decision will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] […] 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).

ANALYSIS

[16] At the outset, it is important to remember that "the dividing line between persecution and discrimination or harassment is difficult to establish, the more so since, in the refugee law context, it has been found that discrimination may very well be seen as amounting to persecution" (*Sagharichi*, above, at para. 3).

[17] In *Rajudeen v. Canada (Minister of Employment and Immigration*), [1984] F.C.J. No. 601 (QL), the Federal Court of Appeal provided a definition for the term "persecution", undefined in the Act, with reference to the Living Webster Encyclopedic Dictionary and the Shorter Oxford English Dictionary:

> "To harass or afflict with repeated acts of cruelty or annoyance; to afflict persistently, to afflict or punish because of particular opinions or adherence to a particular creed or mode of worship." […] A particular course or period of systematic infliction of punishment directed against those holding a particular (religious belief); persistent injury or annoyance from any source.

Further, in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (QL), at para. 63, Justice LaForest endorsed a definition of persecution as "sustained or systemic violation of basic human rights demonstrative of a failure of "state protection"."

[18] It is true that the cumulative effects of discrimination and harassment may fulfil the definitional requirements of persecution in some circumstances, even where each incident of discrimination or harassment taken on its own would not (*Sarmis v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 110, [2004] F.C.J. No. 109 (QL), at para. 17; *Bobrik v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1364 (QL), at para. 22; *Retnem v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 428 (QL); *Madelat v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 49 (QL)).

[19] In sum, the determination of what constitutes persecution involves an analysis of many factors, including persistence, seriousness, and the quality of the alleged incidents (*Ranjha v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 637, [2003] F.C.J. No. 901 (QL), at para. 42; *N.K. v. Canada (Solicitor General)*, [1995] F.C.J. No. 889 (QL), at para. 21).

[20] In the present case, the Applicants submit that while the male Applicant's health benefit was denied on solely one occasion, their age, poor health and financial situation should be taken into

account when assessing whether the threats and other treatment that they have received since 2001 constitutes persecution. In support of this contention they cite the case of *Nejad v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1168 (QL), at para. 4, wherein Justice Francis Muldoon indicated that when evaluating persecution in that case, the CRDD (Convention Refugee Determination Division, established under the previous Act) should have been more cognizant of the effect of harassment upon the Applicants in light of their old age.

[21] Further, the Applicants refer to the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees of the United Nations High Commission for Refugees* (the UNHCR Handbook), at paras. 54 and 55 as providing guidance on this matter:

> […]
> (c) Discrimination
> 54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise [sic] his religion, or his access to normally available educational facilities.
>
> 55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.

[22] In my view, the foregoing paragraph is instructive; the exercise of determining whether cumulative discrimination and harassment constitute persecution is highly factual and requires that individuals' particular circumstances be taken into account. In evaluating the Applicants' case, their personal circumstances and vulnerabilities including age, health, and finances must be taken into consideration as forming part of the factual context, consistent with the UNHCR Handbook excerpted above.

[23] However, in its decision, the Board did indeed take the Applicants' personal circumstances into account. While expressing sympathy for the Applicants in view of their age and health status, the Board highlighted that they had not been put under surveillance, arrested, interrogated, or incarcerated, their movements had not been restricted, and they had not suffered any economic deprivation aside from having to pay medical expenses.

[24] The Applicants refer to documentation suggesting that their total monthly retirement pension does not exceed 500 RMB/month and therefore would not exceed 6000 RMB/year. Thus, the sum of 20 000 RMB which the Applicants' were required to pay for the male applicant's medical treatment is four times their yearly joint income. However, the fact remains that the Applicants were able to pay this fee and since 2002 they have traveled separately to Canada, Hong Kong, Malaysia, and Singapore. Thus, it was reasonable for the Board to conclude that there was no evidence of economic deprivation.

[25] Given these facts, the Applicants' personal circumstances do not make them so vulnerable as to render their treatment at the hands of the PSB persecutory in nature. The Board sufficiently analyzed the relevant facts and came to a reasonable conclusion. In light of this finding, it is unnecessary to address whether the Board applied the wrong standard of proof to the issue of future persecution.

[26] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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