Date: 20081002

Docket: IMM-539-08

Citation: 2008 FC 1112

Ottawa, Ontario, October 2, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

AQING LU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Lu Aqing is a citizen of the People's Republic of China, whose claim for refugee protection was rejected because the Refugee Protection Division of the Immigration and Refugee Board found that there were serious reasons for considering that Ms. Lu had committed a serious non-political crime prior to coming to Canada. As a consequence, she was excluded from the refugee definition by virtue of Article 1F(b) of the *Convention Relating to the Status of Refugees.*

[2] Ms. Lu now seeks judicial review of the Board's decision, asserting that the Board acted in an unfair manner by relying on a document that had not been provided to her. Ms. Lu further

submits that the Board's decision was unreasonable, as it was based upon inconsistent and contradictory evidence, including evidence that had been obtained through the use of torture.

[3] For the reasons that follow, I find that the Board did act in a procedurally unfair manner, and that the Board erred in failing to properly address the evidence suggesting that at least one of the statements made against Ms. Lu had been obtained through the use of torture. As a consequence, the application for judicial review will be allowed.

Background

[4] Ms. Lu was a member of the Communist Party, and held various positions in state-owned corporations. Along with her two brothers, Ms. Lu was charged with a number of offences relating to the misappropriation of public funds. After coming to Canada, Ms. Lu sought refugee protection, claiming to fear persecution as a member of a particular social group.

[5] Ms. Lu asserts that she is innocent of the charges against her, claiming that she was falsely accused by the head of the Anti-Corruption Unit of Shandong Province because she had complained about the treatment of her older brother, Jiaoqing.

[6] Lu Jiaoqing had been charged with fraud and with accepting bribes. Ms. Lu had visited her brother in prison, and had spoken out against the appalling conditions under which he was being held, and the negative effect that his detention was having on her brother's health.

[7] According to Ms. Lu, her brother disappeared for some 18 months while in custody after his arrest in January of 1995, and had later made two suicide attempts. Lu Jiaoqing was evidently convicted of at least some of the charges against him, and was sentenced to death. The death sentence had not as yet been carried out at the time of Ms. Lu's refugee hearing, and Jiaoqing remained in prison in China.

[8] Ms. Lu's younger brother, Lu Xiaoqing, was himself arrested by the same authority in April of 2000, and was charged with similar offences. After 19 months in detention, Xiaoqing pleaded guilty to some or all of the charges against him, and was sentenced to two years in prison.

[9] Xiaoqing is now out of jail, and still resides in China. While he was incarcerated, Lu Xiaoqing provided the authorities with a statement implicating his sister Aqing in his criminal activities.

[10] Ms. Lu's refugee hearing took place over three days – November 14, 2006, April 3, 2007, and May 1, 2007. Counsel for the Minister participated in the hearing, alleging that Ms. Lu should be excluded from the protection of the Convention on the grounds that there were serious reasons for believing that she had committed a serious non-political crime before entering Canada.

[11] The Board accepted the Minister's argument, and Ms. Lu's refugee claim was rejected on the grounds that she was excluded from the refugee definition by virtue of Article 1F(b) of the Convention.

The Interpol "Red Notice"

[12] Ms. Lu's first argument is that she was denied procedural fairness in the refugee hearing, as the Board relied on a document which had never been disclosed to her.

[13] The standard of review analysis does not apply where judicial review is sought based upon an alleged denial of procedural fairness in the hearing process. Rather, the task for the reviewing Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances.

[14] This has not changed as a consequence of the *Dunsmuir* decision: see Justice Binnie's concurring decision in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, at paragraph 129, where he confirmed that a reviewing court has the final say in relation to questions of procedural fairness. See also *Canada (Attorney General) v. Clegg*, [2008] F.C.J. No. 853 (F.C.A.).

[15] Having carefully reviewed the record in this matter, I am satisfied that Ms. Lu was indeed denied procedural fairness in relation to her refugee hearing. That is, it was unfair for the Board to have relied upon a document relating specifically to Ms. Lu's case, namely a "Red Notice issued by the INPO-Interpol Headquarters for Aqing Lu", which document had never been provided to her.

[16] A review of the record discloses that on October 5, 2006, in advance of the first day of Ms. Lu's refugee hearing, her counsel wrote to the Immigration and Refugee Board noting that he had

not yet received copies of the Interpol documents being relied upon to support the Minister's contention that Ms. Lu should be excluded from the protection of the Convention.

[17] Approximately two weeks later, a hearings officer for the Canadian Border Services Agency responded to counsel's letter, stating that "As far as the Interpol documentation is concerned, that is considered confidential and we are not at liberty to disclose it to you or your client".

[18] On October 25, 2006, the Minister's counsel provided counsel for Ms. Lu with disclosure of the documents being relied upon by the Minister at the hearing. Although the list of documents provided with the disclosure package made specific reference to the "Photocopy of Red Notice issued by the INPO-Interpol Headquarters for Aqing Lu", a copy of the actual document was not produced.

[19] Ms. Lu's refugee hearing commenced on November 14, 2006. Counsel for Ms. Lu endeavoured to obtain a copy of the transcript of this hearing, but was advised by the Immigration and Refugee Board that the recording of the first day of the hearing had been corrupted, with the result that the transcript was unavailable.

[20] Various disclosure issues were evidently raised at this hearing, however, and the matter was adjourned to allow for their resolution. It does not appear that the Board made any specific orders in this regard.

[21] On April 2, 2007, the day before the resumption of Ms. Lu's refugee hearing, her counsel wrote to counsel for the Minister, once again raising the issue of the non-disclosure of the Interpol "Red Notice". A copy of this letter was also sent to the member presiding over Ms. Lu's hearing.

[22] Ms. Lu's refugee hearing then resumed the following day. Although the presiding member commenced the hearing by confirming that everyone now had the same documents relevant to the claim, as will be explained further on in these reasons, there is good reason to believe that this was not in fact the case.

[23] Ms. Lu then proceeded to testify in support of her claim. In the course of her testimony, she confirmed that she had never seen any of the Interpol documents being relied upon by the Minister. Ms. Lu repeated this assertion when the hearing resumed on May 1, 2007.

[24] After the completion of the evidentiary portion of Ms. Lu's hearing, the presiding member agreed to allow counsel to provide their arguments by way of written submissions.

[25] In Ms. Lu's submissions to the Board, her counsel reiterated his concern about the failure of the Minister to produce the "Red Notice", despite repeated requests for its production, asking "Why was this document not provided? Does it exist?".

[26] In the responding submissions provided to the Board, counsel for the Minister stated that "We have […] disclosed all the documentation that was provided to this office".

[27] In response to questions from the Court, counsel for the Minister on this application was unable to explain or reconcile the seemingly conflicting representations made by the Minister's representatives in this case with respect to availability of the "Red Notice" from Interpol.

[28] That is, in response to Ms. Lu's October 5, 2006, request for production, the Minister took the position that the documents could not be produced because they were confidential. There was no suggestion at that time that the documents were not in the Minister's possession or were otherwise unavailable.

[29] In contrast, in May of 2007, the Minister took the position that the documents could not be produced because they were simply not available.

[30] The presiding member's decision was released on January 3, 2008. In determining whether there were serious reasons for believing that Ms. Lu had committed a serious non-political crime before entering Canada, the member listed the various documents that he had relied upon in coming to the conclusion that there were indeed good reasons for concluding that Ms. Lu was excluded from the protection of the Convention. Amongst the documents specifically identified by the member in his reasons as providing the foundation for his finding in this regard was the Interpol "Red Notice".

[31] This categorical statement by the presiding member that he had relied upon the "Red Notice" in making his exclusion finding is problematic in light of the assertion of Ms. Lu and her counsel, repeated right up to their final submissions, that they had never even seen the document.

[32] The statement becomes even more problematic, however, in light of the fact that the document does not appear anywhere in the Certified Tribunal Record, nor was an application brought by the Minister under the provisions of section 87 of the *Immigration and Refugee Protection Act* to protect the document from disclosure.

[33] An exclusion finding is a serious one – one that can potentially have very grave consequences for the individual in question. As a consequence, a relatively high degree of procedural fairness is required in a hearing in which there is an issue of potential exclusion.

[34] In all of the circumstances of this case, I have no confidence that Ms. Lu was provided with a fair hearing in relation to her refugee claim.

[35] Before leaving this issue, it should also be noted that because the "Red Notice" apparently relied upon by the member has not been provided to the Court, there simply is no way of knowing what the document says, or how material the evidence was to the member's exclusion finding.

[36] As a result, the application is allowed, and the Refugee Protection Division's decision is set aside.

Evidence Obtained by Torture

[37] While the above finding is sufficient, by itself, to warrant the setting aside of the Board's decision, I will deal briefly with one of Ms. Lu's other arguments for the assistance of the panel that will ultimately have to re-hear Ms. Lu's case: that is, the assertion by Ms. Lu that some of the evidence, including the statement of her younger brother, Xioaqing, implicating her in the misappropriation of public funds, was obtained through the use of torture.

[38] As was the case with the "Red Notice", the presiding member stated quite clearly in his reasons that he had relied upon Lu Xioaqing's statement implicating Ms. Lu in criminal activities in coming to the conclusion that she should be excluded from the refugee definition.

[39] In support of her contention that her brother's statement was obtained through the use of torture, Ms. Lu relied upon her own evidence in this regard, as well as a Notice of Appeal allegedly filed by her brother in China, which makes specific reference to the torture that he says that he endured while he was incarcerated in that country. Ms. Lu also relied upon country condition information relating to the deplorable conditions in Chinese jails, which included numerous references to the widespread use of torture in Chinese penal institutions.

[40] Although the member does make reference in his reasons to the evidence and arguments adduced by Ms. Lu to suggest that Lu Xioaqing's statement was obtained through the use of torture, he considers this evidence only in relation to the question of whether Ms. Lu would herself be subjected to torture if she were to return to China.

[41] In this regard, the member stated that in accordance with the decision of the Federal Court of Appeal in *Xie v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, he was neither required nor permitted to consider or balance the seriousness of a claimant's crimes against the risk of torture in the claimant's country of origin.

[42] With respect, this was simply not sufficient.

[43] In the face of evidence suggesting that an incriminatory statement was obtained through the use of torture, it was incumbent on the member to also consider the reliability of the evidence of torture, and the weight to be accorded to it.

[44] It was open to the member to choose to give little weight to the evidence of torture in this case, provided that adequate reasons were provided for so doing. However, if the evidence of torture was found to be reliable, the member would then have had to go on to consider what weight, *if any*, could or should have been accorded to the evidence in question.

[45] Obviously, if a member were satisfied that the inculpatory evidence was indeed obtained through the use of torture, great caution would have to be exercised before accepting the evidence as reliable or worthy of any weight whatsoever.

[46] Finally, if the presiding member were to conclude that the evidence was not worthy of any weight, in light of the circumstances under which it was obtained, the member would then also have

to consider whether the remaining evidence against Ms. Lu was sufficient to establish that there were serious reasons for considering that she had committed a “serious non-political crime, if the evidence obtained through the use of torture was disregarded in its entirety.

Conclusion

[47] For these reasons, the application for judicial review is allowed.

Certification

[48] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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