Date: 20081006

Docket: IMM-783-08

Citation: 2008 FC 1120

Toronto, Ontario, October 6, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NAI QIANG ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a case of a poorly drafted motion to reopen a refugee claim being answered by an equally poorly drafted response.

[2] For the reasons that follow, I am granting the application for judicial review and am quashing the decision of the Refugee Protection Division dated January 29, 2008, which dismissed the Applicant's application to reopen his claim for refugee protection.

BACKGROUND

[3] The Applicant is a citizen of China who arrived in Canada from Hong Kong on April 1, 2005. A few days later he claimed refugee protection. He claimed to fear persecution by the Public Security Bureau police force of China on account of his membership in an underground Christian church. His claim was rejected on April 12, 2006, on the basis that he had not clearly established his identity as a resident of mainland China. No application for leave and judicial review of that decision was submitted.

[4] During the hearing there was friction between the Member and the Applicant's counsel over the Member's treatment of an original document. The Member used a highlighter to mark a passage that she wished the translator to draw to the Applicant's attention. Counsel objected that the member was "defacing" the document. A formal complaint was subsequently lodged with the Board concerning the Member's conduct. The complaint was made prior to the Member's decision on the claim.

[5] The Applicant, several months after the Member's decision, applied for travel documents from the Chinese embassy. When these were granted, he applied to re-open his claim under Rule 55 of the *Refugee Protection Division Rules* SOR 2002/228. He was of the view that this new evidence established his identity as a citizen of mainland China. Clearly, he wished to have his refugee claim heard on the merits.

[6] The application to re-open was dismissed with no formal reasons. The endorsement on file, dated January 20, 2008, reads as follows:

> Counsel (*sic*) request for a re-opening is denied. Counsel is aware that the claimant must establish his or her identity which according to the member who presided on this claim was not established. Furthermore the claimant could have sought leave with the Federal Court but chose not to. Motion denied.

ISSUE

[7] The Applicant in his memorandum submitted that the issue for determination was whether the Board erred in failing to provide written reasons for its decision. While that issue was dealt with by counsel and will be discussed below, in light of the oral submissions made to the Court, the real issue for determination is whether the reasons that were provided were sufficient at law.

ANALYSIS

[8] The Applicant submitted that the Board failed to comply with subsection 169(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 which requires that written reasons be given except in interlocutory matters. He submits that the decision not to reopen is a final, not an interlocutory decision. Subsection 169(b) reads as follows:

169. In the case of a decision of a Division, other than an interlocutory decision:	169. Les dispositions qui suivent s'appliquent aux décisions, autres qu'interlocutoires, des sections :
(*a*) (…)	*a*) (…)
(*b*) reasons for the decision must be given;	*b*) elles sont motivées;

It is further submitted that the endorsement on the file cannot be construed as reasons.

[9] The Respondent submits that the endorsement on the file does form a part of the decision and does constitute written reasons. It is submitted that while brief, the endorsement informed the Applicant of the reasons for rejecting his application to re-open his claim. The Respondent relies on the decision of the Supreme Court of Canada in *R. v. Sheppard*, [2002] 1 S.C.R. 869, and in particular paragraphs 33, 46 and 53, as standing for the proposition that the requirement for reasons is to be given a functional and purposeful approach. The function and purpose of reasons, it is asserted, is to inform the parties that the issues have been considered and permit them to effect any right of appeal or judicial review. It is submitted that the endorsement meets both these requirements.

[10] Justice Simpson in *Shahid v. Canada (The Minister of Citizenship and Immigration)*, 2004 FC 1607, held that a decision of a Board member dismissing an application to reopen a refugee claim is a final decision, thus reasons are required pursuant to subsection 169(b) of the Act. Justice Mosley came to the contrary view in *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153 and *Vranici v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1417. While I am of the view that Justice Simpson's analysis is correct and that a decision not to reopen is a final decision, I am also of the view that little turns on a determination of whether the decision is final or interlocutory. Reasons are required regardless of the characterization of the decision. Justice Mosley in *Ali* and *Vranici* held that given the importance of the decision not to reopen, which

effectively ends an applicant's refugee claim, "some form of written reasons must be provided to the applicant".

[11] I agree. Further, in my view, the endorsement constitutes the reasons for the decision under review. It is for this reason that I am of the view that the real issue for determination is whether or not the endorsement constitutes sufficient reasons for dismissing the application. That, in turn requires an analysis of the basis of the request to reopen the claim.

[12] The Rule 55 application to reopen was set out in a letter from counsel and accompanied by an affidavit from the Applicant. Counsel did not specify precisely the grounds on which she was seeking to reopen the claim. She wrote: "The claimant is now applying to re-open the case on the following grounds:…". She then wrote 11 paragraphs that discuss the RPD's decision, the evidence before it, the conduct of the Member regarding the highlighting of a document, and the new evidence proving the Applicant's identity, that is, the Chinese travel documents he had obtained. She concluded with this statement: "Since the Board did not hear any evidence on the merits of the Refugee Claim, having made a decision that the claimant was not a National of China, it is respectfully submitted that the claim be re-opened so that the Refugee Division may assess the claim on its merits".

[13] It is impossible to determine with any degree of certainty exactly what grounds were being advanced as the basis for the application to reopen. It appears that the Member who dismissed the

application to reopen was of the view that the only ground being advanced was the existence of new evidence to establish the Applicant's identity, as this is all that was addressed in the endorsement.

[14] If that was the sole ground being advanced in support of the application to reopen, the endorsement of the Member is unsatisfactory for two reasons. First, it has been held that the Board may only reopen a claim under Rule 55 if there has been a breach of procedural fairness: see *Krishnamoorthy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 237, in addition to the cases cited above. The claim that there was new evidence was not an allegation that procedural fairness had been denied. Accordingly, if that was the sole basis for the application to reopen, the Member ought simply to have indicated that the existence of new evidence was not grounds to reopen the claim.

[15] This then leads to the second reason why the endorsement is unsatisfactory. The endorsement says no more than what the Applicant already knew, namely that he had to establish his identity, and that he had not done so to the satisfaction of the Member at the hearing. None of this tells the Applicant why his new evidence was not sufficient to reopen his claim. The endorsement also states that the Applicant could have sought leave of this Court but did not do so. If this was meant to inform the Applicant that his claim could not be reopened because he failed to seek leave to review the decision, it is in error. A claim may be reopened by the RPD if there has been a breach of procedural fairness regardless of whether the original decision was reviewed by this Court or not.

[16] The Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43, said that reasons, in an administrative context, are a "written explanation for a decision". In the context of this case, the question to be asked, if the request was simply to reopen to consider the new evidence, is: 'Does the endorsement provide the Applicant with an explanation of why this new evidence was insufficient to reopen his claim?' In my view, there can be no question that the endorsement provides no explanation at all as to why the claim could not be reopened in the face of new evidence. It does not provide insufficient reasons – it provides no reasons at all.

[17] On this basis alone, the application to quash must be allowed.

[18] However, it is my view that the application to the Board to reopen the claim did rely on more than the simple allegation that there was new evidence – it also relied, in material part, on the conduct of the Member. The motion raised an issue of procedural fairness and natural justice which, if founded, would require that the Board reopen the claim.

[19] I have previously noted that the letter from counsel, while describing the dispute with the original Member over the marking of the document, does not clearly allege that there was a breach of procedural fairness. However, in my view, the Applicant's affidavit which accompanied the motion clearly states as much. In his affidavit Mr. Zhang affirmed: "I believe that the dispute between my lawyer and the member must have influenced the member to make a negative decision against me…" (emphasis added). In my view this statement was sufficient to alert the RPD that a

claim was being advanced that there had been a breach of natural justice and procedural fairness by the Member hearing the case. The statement amounted to an allegation of bias on the part of the Member or, alternatively, a claim that the Member did not render the decision based only on the evidence before her, but was influenced by improper considerations. In other words, it was a claim by the Applicant that he had been denied natural justice and procedural fairness.

[20] As noted, this aspect of the application was not dealt with at all by the Member in the endorsement dismissing the application to reopen the claim. Accordingly, the reasons are insufficient at law and the decision must be set aside.

[21] Neither party proposed any question for certification and on these facts, there is no certifiable question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and the application to reopen is referred to a different Member of the RPD for redetermination.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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