Federal Court  Cour fédérale

Date: 20100308

Docket: IMM-5442-08

Citation: 2010 FC 262

Ottawa, Ontario, March 8, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

DAI LE CHEN
(a.k.a. DAILE CHEN)

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of the decision (the decision) of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 20, 2008, wherein the Board determined that the Applicant is neither a convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27.

[2] Based on the reasons below, the application is allowed.

I. Background

[3] The Applicant is a 24 year old male citizen of China. The Applicant's claim is based on a fear of persecution as a result of his involvement in an illegal underground church. The Applicant came to Canada in September 2006 to study. In December 2006, he made a refugee claim.

[4] The Applicant claims he was involved in an underground house church for five months prior to coming to Canada. He joined the church as he was having difficulty with a colleague. According to the Applicant, the church had 8 members, no pastor, and no fixed location for its meetings. In December 2006, while in Canada, the Applicant stated that he learned from his parents that the church had been raided, four members detained, and a summons left for the Applicant from the Public Security Bureau (PSB) providing, among other things, that the Applicant was involved in illegal house church activities. The Applicant subsequently made a refugee claim in Canada.

[5] The Board determined that the Applicant was not a refugee as he did not satisfy the burden of establishing a serious possibility that he would be persecuted if returned to China. The Board determined that the Applicant is a practicing Christian in Canada but did not practice Christianity in an underground church in China. The Board concluded that that the Applicant's subjective fear was not supported by the objective evidence. The Board stated on page 5 of the reasons that "The panel finds that the claimant could return to Fujian Province and practice Christianity without a reasonable fear of being arrested and jailed."

II. Standard of Review

[6] The issues addressed in this matter will be assessed on a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190*; Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339).

[7] As set out in *Dunsmuir*, above, and *Khosa*, above, reasonableness requires the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

III. Issue

[8] The Applicant set out the issue to be determined thus: whether the Board erred in finding that the Applicant is neither a Convention refugee nor a person in need of protection while finding that the Applicant is a practicing Christian without considering the summons?

[9] The evidence before the Board was the Applicant's oral testimony, his Personal Information Form, and documentary disclosure from both the claimant and the Refugee Protection Division. The summons allegedly left for the Applicant was before the Board.

[10] The only specific reference to the summons in the reasons is in a footnote on page 1. This footnote is part of the Board's review of the allegations. In its review, the Board noted that a summons, that required the claimant to report to the Public Security Bureau on a specific date, had been left with the claimant's parents.

[11] On page 4 of the reasons the Board concluded that "…a house church of the size attended by the Applicant in Fujian Province would not be raided by the PSB nor would the claimant be arrested or sent to jail." The Board stated that it came to this conclusion based on the documentary evidence, and that the Board had placed greater evidentiary weight on this evidence because it provided information from a number of independent sources with no vested interest in the outcome of the proceedings.

[12] The Applicant argues that the Panel erred by ignoring the summons. The Applicant submits that the summons was an important document and is evidence which does not support the Board's findings that the Applicant has no reasonable fear of being arrested or jailed. Consequently, the failure of the Board to meaningfully consider the summons in its written reasons cannot withstand judicial scrutiny.

[13] The Respondent argues that the Board stated that it considered the totality of the Applicant's evidence and specifically identified the summons in its reasons by way of a footnote. They highlight the fact that the Board preferred evidence that prayer meetings and Bible study groups held among

friends and family in house churches tend to encounter difficulties only when the membership grows and the church arranges for regular facilities. The Board also relied on documentary evidence that the Applicant's home province, Fujian, was one of the more liberal with regard to Christian practices.

[14] It is well understood that the Court is to demonstrate significant deference to the Board's assessment of the evidence (see *Camara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 362; [2008] F.C.J. No. 442 at paragraph 12). In addition, the Board is not required to make reference to each item of documentary evidence or summarize all the documentary evidence introduced (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.)).

[15] The Applicant submits that it is a reviewable error for the Board to disregard relevant evidence (see *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359; 295 F.T.R. 35) and that this duty increases with the relevance of the evidence in question to the disputed facts (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35; 1998 CanLII 8667 (F.C.T.D.). At paragraphs 15-17 of *Cepeda-Gutierrez*, above, Justice John Evens stated:

> [15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express

> findings, and an analysis of the evidence that shows how the agency reached its result.
>
> [16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
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> [Emphasis added]

[16] In *Mahanandan v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1228; 49 A.C.W.S. (3d) 1292 (F.C.A.), the applicants argued that the Board failed to consider

adequately, or at all, the objective basis of their fear, including considerable documentary evidence. At paragraph 8, Chief Justice Julius A. Isaac stated:

> [8] We agree. Where, as here, documentary evidence of the kind in issue here is received in evidence at a hearing which could conceivably affect the Board's appreciation of an Appellant's claim to be a Convention refugee, it seems to us that the Board is required to go beyond a bare acknowledgment of its having been received and to indicate, in its reasons, the impact, if any, that such evidence had upon the Applicant's claim. As I have already said, the Board failed to do so in this case. This, in our view was a fatal omission, as a result of which the decision cannot stand.

[17] In this case, I agree with the Respondent that the Board did mention the summons in a footnote on page 1 of its reasons. This mention was a “bare acknowledgement” of the summons being received. The Board also stated that it had considered the evidence as a whole but preferred its documentary evidence because it provided information from a number of independent sources.

[18] However, the mention of the summons in the footnote or the “blanket statement” with regard to the evidence will not suffice in this case. The summons squarely contradicted the Board’s finding of fact that “…a house church of the size attended by the Applicant in Fujian Province would not be raided by the PSB nor would the claimant be arrested or sent to jail.” The summons was highly relevant to the facts in dispute and therefore the Board had an increased “burden of explanation” with regard to the weight given to it.

[19] This case is similar to *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1198; [2009] F.C.J. No. 1492. In *Zhang*, above, Justice Yves de Montigny held that the

Board's failure to review a summons's amounted to a reviewable error. Justice de Montigny stated that the summons was an important piece of evidence in the Applicant's claim and that the Board had an obligation to assess the summons and to give reasons for either accepting it or rejecting it as credible corroborating evidence (see paragraphs 13-17).

[20] In this case, the Board did mention the summons specifically, but did not analyze it in the reasons. While the Board's assessment of the evidence is within their areas of expertise and it is not required to reference each piece of evidence introduced, it was not reasonable for the Board to not directly address how it treated this specific piece of evidence.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is allowed and the decision is set aside and the application is referred back for consideration by a differently constituted panel;

2. there is no order as to costs.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	**CHEN v. MCI**
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APPEARANCES:

Leonard Borenstein	FOR THE APPLICANT
Adrienne Rice	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Leonard Borenstein Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General Canada	FOR THE RESPONDENT