Federal Court  Cour fédérale

Date: 20101116

Docket: IMM-2365-10

Citation: 2010 FC 1145

Ottawa, Ontario, November 16, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BAO SHENG XU

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review filed by the Minister of Citizenship and Immigration in respect of a "ship jumper" from China. The Immigration and Refugee Board (Board) granted his refugee claim.

II. BACKGROUND

[2] Xu claimed to have been persecuted because of his Christian faith. In 2004 the police alleged that Xu was engaged in illegal Christian activity and he was required to report to the police monthly. When his employer learned of the police involvement, he was fired and he claimed that no one would hire him.

[3] Xu apparently got a job as a seaman through family connections. He obtained a passport despite his problems with the police and left China on a ship in April 2005.

[4] The Respondent admits that he came to Canada four times before he jumped ship. He had also gone to the U.S., South Korea and even China – although re-availment was not pleaded.

[5] Having arrived in Canada in 2005, it was not until April 2007 that he filed for refugee status and was baptized a Christian.

[6] There was a litany of inconsistencies in his evidence but the Board found him to be credible. His refugee claim was granted.

III. ANALYSIS

[7] The issues raised were a) whether the Board had failed to provide adequate reasons; and b) whether the Board erred in making unreasonable findings on key issues.

[8] As the Court finds that the reasons were inadequate, there is no need to answer the second issue although the Court has reservations concerning this issue as well.

[9] The issue of adequacy of reasons is a matter of procedural fairness and as such is subject to the correctness standard of review. With respect to the second issue, the standard as it relates to findings of fact based on credibility is reasonableness overlayed with deference owed to the Board.

[10] The judicial policy basis for the requirement of adequate reasons includes allowing the parties to know the underlying rationale for the decision, to determine whether to take further steps in the case, and to maintain a level of transparency and intelligibility sufficient to ensure jurisdiction, fairness and legality. Justice Lemieux in *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 172, at para. 81, held:

> **81** This is the way Justice Hugessen, then a member of the Federal Court of Appeal, expressed himself in *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545:
>
> > Subsection 69.1(11) of the *Immigration Act* [R.S.C. 1985, c. 1-2.] requires that the Refugee Division "give written reasons" for any decision against the claimant. If this obligation is to be met, the reasons must be sufficiently clear, precise and intelligible that the claimant may know why his claim has failed and decide whether to seek leave to appeal, where necessary.
> >
> > …

See also *Canada (Minister of Citizenship and Immigration) v. Koriagin*, 2003 FC 1210, at para. 5:

> **5** To fulfil the obligation under paragraph 69.1(11)*(b)* of the Act, the reasons must be sufficiently clear, precise and intelligible to allow the Minister or the person making the claim to understand the

> grounds on which the decision is based and, where applicable should the decision be appealed, to allow the Court to satisfy itself that the Refugee Division exercised its jurisdiction in accordance with the Act.. See *inter alia*: *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.) (QL); *Minister of Citizenship and Immigration v. Roitman*, [2001] F.C.J. No. 718 (F.C.T.D.) (QL); *Zannat v. Minister of Citizenship and Immigration* (2000), 188 F.T.R. 148; *Zoga v. Minister of Citizenship and Immigration*, [1999] F.C.J. No. 1253 (F.C.T.D.) (QL); *Khan v. Minister of Citizenship and Immigration*, [1998] F.C.J. No. 1187 (F.C.T.D.) (QL).

[11] The benefit of the rule is as applicable to an applicant for refugee status as it is to the Minister. This is not a one way right.

[12] The determination of adequacy of reasons depends on the particular facts of the case and must be assessed in light of the entire record. The requirement is for “adequate” not “perfect” reasons.

[13] In this instance the reasons are deficient and lacking in analysis. The reasons fail to address any of the compelling and contradictory evidence before the Board. The following are merely examples of the problems with this decision.

[14] The Board failed to analyse the credibility and identity concerns of the Minister and their impact on the finding of truthfulness. These can be summarized as the failure to address significant discrepancies between the CIC interview, the Respondent’s PIF and the hearing testimony.

[15] The Board reached inconsistent conclusions as to Xu's fate upon return to China. First, the Board held that he would be arrested and then it held that it was unclear whether he would be arrested.

[16] The Board held that Xu was a Convention refugee in part because of his political opinion and then concluded that it was unclear whether he would be considered a political opponent.

[17] The Board merely said "the documents make it clear …", with respect to the police potentially arresting, detaining and torturing Xu without due process, but did not refer to any of the contradictory evidence within the same documents.

[18] There is no analysis of the IFA finding but simply a conclusionary statement that IFA was not available. There was no attempt to address the fact that it was only the local police who had posed a problem; the absence of evidence that the police were likely to pursue him; the failure to consider that Xu had returned to China at least once with no problem and that he had never tried to relocate to another part of China before he signed on as a sailor.

[19] Taken as a whole and without microscopic examination, the Board's reasons are inadequate.

IV. CONCLUSION

[20] Therefore this judicial review is allowed, the Board's decision is set aside and the matter is to be referred back to the Board for a new determination by a differently constituted panel.

[21] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the Board's decision is set aside and the matter is referred back to the Board for a new determination by a differently constituted panel.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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