Federal Court  Cour fédérale

Date: 20101125

Docket: IMM-115-10

Citation: 2010 FC 1164

Ottawa, Ontario, this 25th day of November 2010

Before: **The Honourable Mr. Justice Pinard**

BETWEEN:

MARIANA SURYANTI
KEVIN KAO

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Refugee Protection Division Member Normand Leduc of the Immigration and Refugee Board (the "Board"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") by Mariana Suryanti (the "applicant").

[2] The applicant applied for refugee status under sections 96 and 97 of the Act, claiming that she had a well-founded fear of persecution in her home country of Indonesia, and that if she returned she would be subjected to a risk to her life or to cruel and unusual punishment because she is a Christian of Chinese origin. The Board found the applicant did not face a “risk of return”, nor would she be subject to discrimination amounting to persecution if she was to go back to her home country, and therefore she did not qualify as a Convention refugee or a person in need of protection. The Board also rendered a negative decision regarding the refugee status of the applicant’s son, Kevin Kao, which is not under review here.

* * * * * * * *

[3] The applicant is a 33-year-old Christian woman of Chinese origin and a citizen of Indonesia. It is because of experiences related to her ethnic and religious background that she decided to leave her home country at the age of 18. She claimed that she lived in a state of tension in Indonesia, having been robbed by individuals of Indonesian origin while she was travelling on public transit, and having once been fondled on the street. When she went to the police for help, she was simply asked for money. The applicant also stated that a person of Indonesian origin once threw a rock through the window of the church that she attended, and that she was reluctant to walk around openly with a Bible for fear of provoking the anger of certain Muslims. In addition, she was subject to rude and derogatory comments on the street because of her Chinese origin. The applicant claimed that because of the discrimination in Indonesia against those of Chinese origin, as well as against Christians, she was in constant fear of being attacked at her church or home.

[4] In 1998, the applicant left Indonesia for the United States, where she lived without status and where she also gave birth to her son. On March 22, 2008, she illegally crossed the border into Canada and subsequently made her claim for refugee status on April 7, 2008. Her son arrived legally in Canada with friends of the applicant on March 17, 2008.

[5] The applicant and her son attended their refugee hearing in Montreal on October 26, 2009. On November 20, 2009, the Board rendered its decision, finding that the applicant and her son were not Convention refugees or persons in need of protection.

* * * * * * * *

[6] The Board found that while the applicant's testimony was "sober and unexaggerated", her experiences in her home country were isolated incidents that did not amount to persecution or demonstrate a "risk of return". In addition, the Board noted that the applicant's sister, also a Christian of Chinese origin, continued to live in Indonesia with no problems.

[7] The Board also cited the country condition evidence that had been filed regarding the general situation of Chinese and Christians in Indonesia. While it recognized that there was evidence of attacks and discrimination against "certain minorities" in the country, there were also indications that this type of behaviour towards those of Chinese origin had been on the decline in 2008 and that the government "generally respected" freedom of religion.

[8] Overall, the Board was not convinced that if the applicant were to return to Indonesia her life would be at risk, nor that there was a risk that she would be subjected to cruel and unusual punishment or torture. In addition, it did not find that the discrimination she may be subject to in Indonesia would amount to persecution.

* * * * * * * *

[9] The applicant raises a number of issues in her submissions that can be distilled into the following:

a. Did the Board err by failing to provide adequate reasons for its decision?

b. Did the Board fail to take into account the totality of the evidence when rendering its decision?

c. Did the Board err in law by applying the section 97 "risk of return" test to its evaluation of the applicant's status as a section 96 Convention refugee?

[10] A claim that a decision-maker failed to give adequate reasons in his or her decision is a question of procedural fairness that should be reviewed on the standard of correctness (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 50; *Andryanov v. Minister of Citizenship and Immigration*, 2007 FC 186, at paragraph 15).

[11] The question as to whether a decision-maker erred in its treatment of the evidence should be reviewed on the standard of reasonableness (*Dunsmuir*, *supra*, at paragraphs 51 and 53; *Cabrera v. Minister of Citizenship and Immigration*, 2010 FC 709, at paragraph 21).

[12] Finally, whether the Board applied the correct legal test in determining the applicant's status as a Convention refugee is a question of law that must be reviewed on the standard of correctness (*Dunsmuir*, above, at paragraphs 55 and 60).

* * * * * * * *

A. *Did the Board err in law by failing to provide adequate reasons for its decision?*

[13] The applicant claims that the Board failed to adequately explain how it came to the conclusion that the discrimination to which the applicant may be subject if she returns to Indonesia would not amount to persecution. In addition, the applicant claims that the Board did not turn its mind to the total effects of the discriminatory acts, and whether they could constitute persecution on cumulative grounds. Specifically, by finding that the applicant's experiences amounted to "isolated incidents", the Board demonstrated a lack of sensitivity to the cumulative impact of each incident and the general atmosphere of insecurity for Chinese Indonesians.

[14] Reasons must be sufficient for a party to know why a claim is rejected and must reflect consideration of the main relevant factors (*Townsend v. Minister of Citizenship and Immigration*, 2003 FCT 371, at paragraph 22; *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.)).

[15] In rejecting a claim for refugee status under section 96, a Board is obliged to find that there is no serious possibility that the applicant will face persecution either subjectively or objectively.

The Federal Court of Appeal attempted to define persecution in *Rajudeen v. Minister of Employment and Immigration*, [1984] F.C.J. No. 601 (QL), 55 N.R. 129:

> The first question to be answered is whether the applicant had a fear of persecution. The definition of Convention Refugee in the *Immigration Act* does not include a definition of "persecution". Accordingly, ordinary dictionary definitions may be considered. The *Living Webster Encyclopedic Dictionary* defines "persecute" as:
>
> "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."
>
> *The Shorter Oxford English Dictionary* contains *inter alia*, the following definitions of "persecution":
>
> "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."

[16] It is the Board's lack of consideration of the factors relating to the possible existence of objective persecution in Indonesia against Chinese and Christians that is the most troubling. In its short reasons, the Board cites "incidents of attacks or discrimination against certain minorities" over the past few years before stating that the discrimination to which the applicant may be subject would not amount to persecution. Recognizing that discrimination exists in a country and then stating that it does not amount to objective persecution is allowable, but only if the decision-maker gives some explanation as to why.

[17] The applicant cites the recent Federal Court decisions of *Junusmin v. Minister of Citizenship and Immigration*, 2009 FC 673, and *Limarto v. Minister of Citizenship and Immigration*, 2009 FC 521. Both of these decisions discuss at length the situation in Indonesia as it pertains to Chinese

Christians, and the cumulative effects of discrimination on that population. While the fact patterns of the claimants are very different to the one at bar, and thus should be treated carefully, the principle that they articulate is still sound: while Boards are not required to cite every piece of information in their decisions, significant evidence in the country condition documents that directly contradicts a Board's finding must be addressed (*Junusmin*, at paragraph 38; *Limarto*, at paragraph 23).

[18] In the case at bar, the country condition documents point to continuing problems for Chinese Indonesians. A March 2006 Response to Information Request states that although the situation of ethnic Chinese in Indonesia has improved since the fall of the Suharto regime in 1998, and there were no reports of attacks against the group between January 2004 and March 2006, they remain "legally and socially vulnerable" (IDN101030.E., 28 March 2006, Response to Information Request Report (2004-2006)). According to the same report, post-1998 reforms have been "insufficient to deliver freedom from institutionalized discrimination for the ethnic Chinese in Indonesia" who continue to have difficulty obtaining identity documents such as birth and marriage certificates. Additionally, the Board was also presented with numerous articles that described the firebombing of churches by Muslim extremists, the beheading of Christian schoolgirls, and congregations being forced to close their churches out of fear, all pointing to a severe lack of religious tolerance in Indonesia. The Board only made passing reference to this information before declaring it not to be persecutory in nature.

[19] Given the systemic discrimination against both those of Chinese origin and Christians in Indonesia over the past decade, I find that the Board was required to delve further into the evidence

to give reasons why it did not find the state of discrimination towards members of those minority groups, including the applicant, to amount to persecution. This is not to say that such a finding would be unreasonable, simply that the Board was required to take the reader through its train of logic in a more meaningful way.

[20] As a result, I do not find that the Board gave adequate reasons in its decision.

B. *Did the Board fail to take into account the totality of the evidence when rendering its decision?*

[21] The applicant claims that the Board failed to take into account any of the evidence in the Refugee Protection Division's binder that points to a "compelling pattern" of persecution against Chinese Christians in Indonesia. In addition, she claims that the Board did not take into account the "abundant evidence" which contradicts its findings.

[22] For the reasons cited above, I find that the Board did indeed fail to take into account the totality of the evidence before it. As was stated in *Cepeda-Gutierrez et al. v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35 at paragraph 17, a decision-maker's burden of explanation increases with the relevance of the evidence in question to the disputed facts. While it specifically cited attacks and discrimination against minorities in Indonesia, including the 1998 riots against the Chinese, the Board did so in a perfunctory fashion, without evaluating the information in a critical manner. The Board additionally failed to take into consideration the cumulative effects of years of discrimination in Indonesia against both Christians and Chinese, of which there was much evidence before it. While it is not up to this Court to re-weigh the evidence that was in front of the

Board (*Dunsmuir*, above, at paragraph 47), it does not appear from its decision that it weighed much of the evidence at all.

[23] Thus, the Board failed to give adequate reasons for its decision and also did not seem to take into account the totality of the evidence before it. This is sufficient to allow this judicial review application without having to deal with the issue concerning the test applied by the Board for section 96 of the Act.

* * * * * * * *

[24] Consequently, the judicial review application is allowed and the matter is sent back to a differently constituted Board for reconsideration.

[25] No question is certified.

JUDGMENT

The application for judicial review is allowed. The decision of the Refugee Protection Division of the Immigration and Refugee Board (the "Board") dated November 20, 2009 is set aside and the matter is sent back to a differently constituted Board for reconsideration.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-115-10
STYLE OF CAUSE:	MARIANA SURYANTI, KEVIN KAO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 19, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	November 25, 2010

APPEARANCES:

Me Mitchell Goldberg	FOR THE APPLICANTS
Me Sylviane Roy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mitchell Goldberg Montréal, Quebec	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT