

Federal Court



Cour fédérale

Date: 20110406

Docket: IMM-4640-10

Citation: 2011 FC 422

Ottawa, Ontario, April 6, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JIAN HUI WENG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision dated July 9, 2010 of the Refugee Protection Division of the Immigration Refugee Board (the Board), which found the applicant not to be a Convention refugee nor person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act, 2001, c. 27 (IRPA)*. For the reasons that follow this application for judicial review is granted.

[2] The applicant is a citizen of China. Before the Board he claims that he and his wife are Christians wanted by the Public Security Bureau (PSB) for their participation in an underground church. When the church was allegedly raided, on February 17, 2008, the applicant was not there but his wife was. She managed to escape. The applicant and his wife went into hiding at the home of his wife's aunt, and thereafter enlisted the assistance of a smuggler to exit China. The applicant arrived in Canada on April 21, 2008 and made a claim for refugee protection on April 23, 2008. The claim was rejected on July 9, 2010. The Board found that the applicant was neither a Convention refugee nor a person in need of protection.

[3] The Board found that the determinative issues in the claim were: the credibility and plausibility of the applicant's oral testimony concerning his membership in an underground church and the pursuit by agents of the PSB. The Board also found that the applicant was not a credible witness in this regard and was not currently wanted for arrest by the PSB on account of his underground Christian activities in China. Finally, the Board added that should the applicant return to his home in the Fujian province in China, and should he continue to practice Christianity there, there is not a serious possibility that he would be persecuted in Fujian province for that practice.

[4] The applicant argues the following issues before the Court:

- i) Did the Panel commit a reviewable error in not accepting, on a balance of probabilities, that the applicant was a member of an underground Church and that he was being pursued by the PSB for his activities associated with an underground Christian Church?
- ii) Did the Panel commit a reviewable error in finding that the applicant could practice his Christianity at any Church in the Fujian province?

[5] If these errors are found to have occurred, then the issue is really whether the decision becomes unreasonable, i.e. is the decision not within the range of possible, acceptable outcomes defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

The Applicant's Membership in the Underground Church

[6] The Board made a number of credibility findings with respect to the applicant, based on: (a) material omissions in his PIF; (b) failing to mention certain identity documents in his PIF; (c) ambiguity in his testimony with respect to a Notice of Seizure issued by the PSB; (d) the applicant's hiding and the circumstances around it; (e) ignoring his daughter in his evidence; (f) the questionability of the applicant's role as a lookout at the church; and, (g) the lack of a summons issued by the PSB.

[7] The Board made no less than seven adverse credibility findings. Nonetheless, the applicant contends that the Board was "overzealous and/or hypercritical in finding defects in the applicant's credibility." As well, the Board was concerned about the applicant shifting blame for omissions to his "consultant", and the failure to raise certain matters at the first hearing date.

Failing to Mention Certain Identity Documents in his PIF

[8] On this point, counsel for the applicant submits that the omissions from the PIF cited by the Board were based on an overzealous assessment of the PIF.

[7] The claimant was asked why he had neglected to list the Resident Identity Card (RIC) photocopy, the Drivers License, Marriage Certificate and Welders License on his PIF form at question number

twenty-two. It is noted by the panel that the claimant testified to having received these documents in February 2009. He replied that a “consultant” filled out the form and he had “no idea at all, they did not tell me” (what was put in the form). The panel finds this explanation is unreasonable. In as much as the identity of the claimant is a key “issue” in any claim for refugee protection, the lack of primary identity documents such as a Resident Identity Card, Passport or Birth Certificate in this particular claim, make the provision of identity information of greater importance. (The panel also notes that it would have been of assistance to the IRB to have these documents prior to the hearing in order to attempt to verify their status as genuine.) As noted above the claimant was assisted by experienced counsel and has testified to the accuracy and completeness of his PIF documents. The panel draws a negative inference from the claimant’s omission of information from his PIF that is considered essential in the identification process. [Emphasis added].

[9] The Board’s adverse credibility finding on this point is unsupported given that the applicant mentioned the seizure of the Resident Identity Card (RIC) in his PIF narrative. The applicant did mention the seizure of his wife’s RIC in his PIF narrative. This is an error on the face of the record. The applicant did disclose this in his PIF narrative.

[10] Counsel for the respondent concedes this, but contends that this is a minor point in the overall credibility finding. The Board made wide-ranging findings that touched on many aspects of the applicant’s story. This point was a minor one and was not central to the claim or to the Board’s negative credibility finding.

[11] However, counsel for the respondent further argues that the Board never disputed that the applicant stated in his PIF that his RIC was seized. The Board drew a negative inference from the applicant’s failure to provide numerous identity documents that were in his possession at the time that he filed the PIF. The applicant’s explanation for not providing key documents prior to the

hearing, copies of his RIC card, driver's license, marriage certificate, welder's license, and the Notice of Seizure of his RIC, that it was his consultant's fault and he did not know what he needed to provide, was deemed unsatisfactory by the Board. The Board noted that the applicant was aware that he was entitled to make PIF amendments. The Board drew a negative inference from the applicant's failure to provide the documents at an earlier time, when there would have been additional opportunity to verify their genuineness.

Testimony with Respect to a Notice of Seizure issued by the PSB

[8] The claimant disclosed a "notice of seizure" left with his family by the PSB. He was asked when he became aware of the document and he stated it was mailed to his home in China approximately one week after the PSB searched his home and confiscated his Resident Identity Card (RIC) on February 19, 2008. The panel confirmed that the claimant was aware of this document when he prepared his PIF (May 02, 2008). He replied "yes". He was asked why there was no reference to the "notice of seizure" in his PIF narrative. The claimant replied that he "did not know what he needed to provide" (in his PIF). The panel notes that the PIF narrative requires the claimant to "set out in chronological order all the significant events and reasons that have led you to claim refugee protection in Canada. Indicate the measures taken against you and members of your family, as well as other similarly situated persons". The claimant declared in writing and at the start of the hearing that the contents of his PIF are complete, true and accurate. He also confirmed at the start of the hearing that the contents of his PIF were interpreted back to him. Experienced counsel assisted the claimant and he made amendments to his PIF as late as the day of the first sitting of his hearing, indicating that he was well aware of the ability to make amendments prior to his hearing. He was asked why this document was provided to the Refugee Protection Division (RPD) on April 29, 2010, just prior to his refugee hearing. The claimant stated that he did not know why it was so late. The panel notes that the claimant testified to receiving the "notice of seizure" in a package sent by his mother in February 2009. He was asked if he had the package that the information was sent in. The claimant replied that he "threw it away". The panel draws a negative inference from the claimant's actions and testimony placing limited importance to the timely presentation of documents in support of his refugee claim as well as

providing supporting documentation and acknowledgement of the “notice of seizure” in his PIE narrative. [Emphasis added].

[9] The panel asked whether the PSB confiscated his wife’s RIC. He responded “yes” and was subsequently asked why he had not referred to his wife’s RIC being “seized” in any documents. The claimant stated that his wife also had a “notice of seizure”, but he did not think it was important. The claimant was reminded that his identity was an issue in this claim and any information that may assist the panel was important. He was given an opportunity to provide additional comment and declined. The panel draws a further negative inference over the claimant’s testimony assigning little importance to the provision of all evidence relating to his claim. [Emphasis added].

[12] The Board also had no valid basis for rejecting the Notices of Seizure that were in evidence before it. It is not sufficient to simply dismiss the Notices of Seizure on the basis of a statement in the country documentation that fraudulent documents are available to refugee claimants.

The Applicant’s Hiding and the Circumstances Around it

[11] At the first sitting, the panel inquired about the location that the claimant and his wife used for hiding following the alleged raid on their underground house church. The claimant replied that it was the home of an aunt on his wife’s side of the family. The panel asked if the claimant was worried that they chose a close relative with an active relationship in the same city to hide with. He stated they (the claimant and his wife) could not think of another place and his wife had spread the gospel to her previously. The panel specifically asked if there was anything else. The claimant replied that his wife had a close relationship with her and they spoke regularly.

[12] The claimant was asked where his wife was at the current time (over 2 years later). He responded that she was still at the aunt’s home. During the second sitting the panel noted if the claimant’s wife had been at this location for over two years, would people not notice a different individual and become suspicious. The claimant responded that the home was isolated and not many visitors came there. The panel subsequently inquired if this location as a place to hide was important to the claimant. He indicated it was. The claimant was later asked if this was the reason they chose this location to hide.

He responded that it was partially the reason. He was asked why he did not mention these facts in the last sitting. The claimant stated he did not answer thoroughly. The panel asked why, if this was important in his choice of a place to hide from the PSB, was it not included in his PIF narrative. He replied that his consultant did not ask him for the details. The panel does not find this explanation reasonable or sufficient. The claimant's story has evolved in a noteworthy manner over the course of two sittings to the point where choosing the location to hide played a significant role in the claimant's wife allegedly being able to remain in hiding for over two years. The panel thaws a further negative inference from the claimant's evolving testimony and the omission of significant details from his PIF narrative. [Emphasis added].

[13] In my view, the Board was overzealous in viewing this additional reason for hiding at his aunt's home as a discrepancy in the applicant's oral testimony. It was inaccurate to label this as an evolution of the applicant's testimony; rather it was an additional point, consistent with the prior testimony.

[14] This issue has very little to do with the claim, and in my opinion, does not, standing on its own, impeach the applicant's credibility. The additional evidence was not inconsistent with the prior testimony, nor was it properly considered to be an embellishment or a strategic addition crafted to bridge a gap in the narrative.

Ignoring his Daughter

[13] During the first sitting of the claimant's hearing, he was asked if the PSB had threatened or penalized his family members as well as his children in retaliation for the claimant and his wife not presenting themselves to the PSB. The claimant was specifically questioned about school restrictions in reference to his children. He stated "no". During the second sitting the panel attempted to confirm this information and the claimant indicated his oldest daughter could not return to university because he was considered to be a criminal. The panel asked the claimant why he did not mention this information previously. He replied that he did not feel the information was

important. The panel responded by asking the claimant if the fact that an individual is denied the opportunity to continue her education is an important event. He stated “no” and added that his daughter was working and it was “OK if she is not going to school”. The panel inquired why he had not included this information in his PIF narrative. The claimant replied that at the time it had not yet occurred. The panel reminded him that he was able to amend his PIF with important information. The panel reminded the claimant that the requirements of the PIF narrative specifically state “indicate the measures taken against you and members of your family”. He was asked why he did not refer to the restriction on his daughter with respect to university in his PIF narrative. The claimant replied; “I did not feel it was important to put it down ... not a big impact” (on her). The claimant was asked if he had consulted with his counsel prior to attending his hearing. He stated he did meet with his counsel. [Emphasis added]

[14] The panel asked why the claimant had not provided evidence at the hearing of this alleged action by the PSB to assist in his claim for refugee protection. He responded that he did not know how to get the information. The panel notes the claimant was asked by the panel to obtain other documentation to assist in his claim and he had no difficulty producing the material in the six weeks between hearing sittings. The claimant had approximately one and one half years prior to the first sitting of his claim for refugee protection, to obtain this information. The panel finds the claimant’s action in omitting essential information from his PIF narrative unacceptable. The panel also finds the inability of the claimant to answer a simple, specific question in initial oral testimony in an honest and straightforward manner unacceptable. His action to later insert this information in oral testimony at a significant point to reinforce his claim, not because his memory lapsed, but because he did not feel it was “important” is objectionable. These actions cause the panel to question the claimant’s ability to act as a credible witness. The panel draws a negative inference to the claimant’s credibility through his testimony and actions in this matter. [Emphasis added].

[15] In reviewing the cumulative effect of the Personal Information Form omissions, the negative inferences drawn through these omissions and the negative inferences to the claimant’s credibility drawn from inconsistencies in testimony, leads the panel to find on a balance of probabilities that the claimant has failed to act as a credible witness. [Emphasis added].

[15] This issue has very little to do with the claim, and in my opinion, seems to be a weak foundation on which to impeach the applicant's credibility.

The Questionability of the Applicant's Role as a Lookout at the Church

[16] The claimant noted in his PIF narrative that he had acted as a Lookout at his underground church. The panel asked him to describe the activities he would perform on a day that he acted as a Lookout. He stated that you arrive early, station yourself in the front or back and look around the area. The panel asked if you communicate in some way and was there a special number to call. The claimant indicated a cell phone was used. The claimant appeared to be unsure of the Lookout role and the panel prompted him by asking if a different person performed the job each time. He answered in the affirmative, but did not indicate the "leader" assigned the Lookouts. He was asked if it was necessary to go back to the underground church after the service. The claimant answered that it was, but did not mention that this would be the time Lookouts were assigned for the next service. The panel finds it unreasonable that the claimant having alleged that he attended the underground house church once a week for approximately eighteen months and took an active role as participating as a "lookout", would not be able to readily describe the role without prompting. This causes the panel to question his role as a member of an underground Christian church in China. [Emphasis added]

[16] In my view, the Board's negative comments regarding the applicant's testimony about his role as a lookout are not supported by the transcript. The applicant was able to describe his role as a lookout and appeared to be able to spontaneously answer each of the Board's questions about his duties as a lookout in a responsive manner.

The Lack of a Summons Issued by the PSB

[17] During the first sitting, the claimant was asked how many times in total had the PSB visited his home in search of him and his wife. He replied that it was approximately ten times, with the most recent visit occurring this year (2010). The panel noted that the PSB must

be very interested in the claimant and his wife if they are still visiting his home.

...

The claimant was asked if a warrant or summons was left for him. He replied in the negative. The panel commented that the PSB appear to have limited interest and lack serious effort in finding the claimant and his wife. The claimant was given the opportunity to respond to this statement. He replied that he had “no idea how the PSB conducts business”. The panel notes that country condition documents indicate that a summons is generally left with or shown to family member when the police want someone to come to their headquarters. In addition, the summons is the documentary basis for the subsequent issuance of an arrest warrant if the person in whom they are interested does not respond to the summons. Although this policy is not always implemented, it is reasonable that one would have been issued in respect of the claimant given that the claimant testified that the PSB had gone to his home in search of him on ten occasions. [Emphasis added]

...

The panel draws a negative inference from the lack of a summons and the claimant’s testimony with respect to the actions of the PSB in searching for him and his wife.

[17] In my view, the applicant’s testimony was clearly within the realm of possibility and was reconcilable with the country condition evidence before it regarding uneven practices on the part of the PSB. The Board erred in law in drawing an implausibility finding here. It was, in the context of this case, an error of law to speculate on the mental processes and efficiency of the Chinese authorities. In *Liu v Canada (Citizenship and Immigration)* 2010 FC 135, the Federal Court stated as follows:

...while the Board was entitled to note that the PSB sometimes leaves a summons with a suspect’s family, the fact that no summons was left with Ms. Liu’s family does not support a conclusion that she was not being sought. The evidence before the Board was that the PSB’s practices were uneven.

[18] Credibility findings are the Board's domain, and are entitled to deference. It is not the role of this Court to reason or re-weigh the testimony. This Court has not seen the witnesses, nor observed the rhythm and pace of their testimony. Here, however, there are a series of negative credibility findings on collateral points, immaterial to the claim itself and in respect of which the differences or deviations are at best marginal.

[19] Credibility is often founded on small issues, the cumulative effect of which is to either establish, or erode, credibility. In this case, the discrepancies were marginal, on marginal issues. Moreover, in respect of the RIC, the Board drew a negative inference when it is conceded that it could not. On this point, which was not tangential, the Board was in error.

[20] For these reasons, the application is granted and the matter is remitted to a different panel of the Board for determination. The issue of the Board's findings as to the nature of the risk the applicant faced need not be addressed.

[21] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is remitted to a different panel of the Board for determination. The issue of the Board's findings as to the nature of the risk the applicant faced need not be addressed. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4640-10

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**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: April 6, 2011

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