

Federal Court



Cour fédérale

Date: 20120509

Docket: IMM-6273-11

Citation: 2012 FC 554

Ottawa, Ontario, May 9, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CHIPENG SU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The decision of the Refugee Protection Division of the Immigration and Refugee Board that Mr. Su is neither a Convention refugee nor a person in need of protection must be set aside.

[2] The Board believed that Mr. Su is a homosexual. It did not believe that he was arrested and assaulted by the police. Accordingly, it found that Mr. Su would not face a serious risk of harm in China.

[3] Although there are aspects of the evidence from which one might conclude that Mr. Su's story is not credible, the difficulty with the Board's decision is that some of the facts it relied on to ground the credibility determination are not in accord with the evidence.

[4] The first such factual error is the following. The Board writes that:

In his Personal Information Form the claimant alleges that he was rounded up by police as part of a campaign against prostitution and that "sexual trade" was the basis of the charge against him. When I asked him at the hearing what he was charged with in China he again stated that it was for engaging in "sexual trade." However I note that the charge contained in the document he has provided in evidence states that he was charged with "acting promiscuously and licentiously inside the Anti-British-fight Memorial Park." The claimant has not been able to satisfactorily explain this discrepancy other than to reiterate that he had been framed and to opinion [sic] that the meaning of "acting promiscuously and licentiously" are the same as engaging in prostitution [footnote omitted].

[5] In fact, the applicant did not testify as clearly as is suggested by the Board that he had been charged with "sexual trade." In his Personal Information Form [PIF], in response to the question as to whether he had ever been "sought, arrested or detained by the police" he responded that he had and in response to the question "why?" responded "[a]lleged sex prostitution [emphasis added]." At the hearing when asked what charge he faced he responded, at first "it is the police authority who charged me for doing sexual trade in the public place, which means to do promiscuous in the fetish deal." When asked to clarify what he meant he said "[t]hey charged me with licentiousness, promiscuous and licentiousness conduct in public place."

[6] In my view, a fair reading of the PIF and transcript shows that the applicant was consistent in asserting that the police officers accused him of engaging in “sexual trade” or male prostitution, when he was in fact engaging in flirtatious conduct with his boyfriend. Officially, they charged him with “acting promiscuously and licentiously inside the Anti-British-fight Memorial Park” as shown on the police documents in evidence at pages 404-407 of the certified tribunal record. The allegation that he was engaged in sexual trade was the ruse, not the charge. Accordingly, I find the Board’s reliance on this alleged inconsistency to be unreasonable.

[7] Second, the Board relies on an alleged inconsistency between the probation summons and the charges cited above. The probation summons in translation reads, in relevant part, as follows: “The person being summoned ChiPeng SU due to sodomy....” The Board noted that sodomy and prostitution were not the same. At paragraph 16 of the decision it writes:

When I pointed out to the claimant that there was also a major difference between the words “sodomy” and “prostitution” and that according to the objective documentation there were apparently no laws against sodomy in China, he was again unable to explain why this was listed as the charge against him in the document. At this point in the hearing, claimant’s counsel questioned the interpreter about whether the characters used in Chinese could also mean “prostitution” and she agreed that under a particular way of reading the characters this could be true [emphasis added and footnotes omitted].

[8] The Board failed to give any reason for rejecting this evidence that would resolve in the applicant’s favour the discrepancy of whether the document could be interpreted as referring to “prostitution” and not to “sodomy.” In my view, the following exchange at the hearing involving the interpreter and Mr. Su’s counsel makes it clear that the Chinese characters used can mean prostitution:

MR. TSE: I'd just like to go back to clarify the wording on that document.

PRESIDING BOARD: Yes.

MR. TSE: To me, it's really important.

Mrs. Interpreter, can you look at the Chinese word or the Chinese text at page 80 for the word that was translated as sodomy and translate the exact words and the sounds, like the literal meaning of the words themselves. There's two characters that are sort of significant.

I'll show you what the Translator had highlighted to me, the two characters. Then if I can ask the Translator for the two characters each to say what those characters are.

PRESIDING BOARD: Yeah, in the original there is some -- it is handwritten on part of the form. I wonder if you could just show her the original document. It's in that book there. I noticed it when I looked through it. Yeah, there's handwriting on the form. Is that the one?

...

MR. TSE: But yeah, those characters themselves, Ms. Translator, can you read those words, the word itself?

INTERPRETER: Those two words mean "sodomy"

MR. TSE: I mean the word.

INTERPRETER: Oh, in Chinese it's (indiscernible); it could be cut into two places.

MR. TSE: Yeah, I want each piece.

INTERPRETER: Well, you do the translation it's to the meaning, sometimes not word for word.

MR. TSE: Yes.

INTERPRETER: But word for word in Chinese is (foreign language spoken) first letter and the (foreign language spoken) is the second letter. And (foreign language spoken) is to have sexual contact with

and (foreign language spoken) means prostitute, so to have sexual contact with a hooker. That's the broad way.

MR. TSE: And those two characters, when you translate to English, it means the word "sodomy"?

INTERPRETER: Also deriving to (indiscernible) word, "sodomy," or in the verbal way, "to have sexual contact with prostitute."

MR. TSE: Okay.

PRESIDING BOARD: Well, which is it?

INTERPRETER: It can be both. One original meaning arriving from different bookish word, "sodomy."

MR. TSE: It can be both?

INTERPRETER: It can be both because the Chinese language is not very black and white. This meaning derived this word, similar meaning but with a broader definition [emphasis added].

[9] This translation issue goes to the heart of an alleged discrepancy upon which the Board rested much of its credibility finding. If the alternate definition is accepted, then there may be no discrepancy between Mr. Su's evidence that he was charged with "acting promiscuously and licentiously" due to an accusation that he was engaging in male prostitution and the probation summons saying he is summoned "due to" engaging in sodomy or prostitution. The document does not appear to characterize the charge, rather it appears to characterize the act that led to the charge. The Board's rejection of this evidence, without any explanation, is unreasonable.

[10] I accept the submissions of counsel for the Minister that the probation summons remains problematic, especially as there is no mention in the other documents of the applicant being

subjected to a probationary period, however, his own evidence in that respect may have been given greater weight if the documentary evidence had not been rejected by the Board.

[11] I also find that the Board's negative credibility assessment with respect to the applicant's interactions with the police was made without regard to the evidence that police arbitrarily use a variety of legal pretexts in order to penalize public displays of homosexuality. Mr. Su testified:

So what I meant was that if in May the police authority had started a campaign to eradicate any prostitution and they had to or they must get rid of how many, how many prostitution cases. When they were unable to fulfill that quota, which means they were unable to get enough prostitutes, then they will take us, those homosexual people, to replace the quotas they were unable to fulfill and took us as that... So the police authorities used the name of eradicating pornography to arrest some homosexual people.

This submission that homosexuals were arrested to meet quotas established for prostitution arrests was not dealt with by the Board. In my view, the Board erred in failing to analyze the repeated allegations made by Mr. Su, supported by documentary evidence, that the authorities used false pretexts to persecute him.

[12] The Board found, alternatively, that Mr. Su had an internal flight alternative (IFA) in Shanghai where, the Board claimed, gay and lesbian life is generally accepted. The Board stated that other than to speculate that his probationary status would not permit it, Mr. Su provided no satisfactory explanation why he could not relocate there. It noted that he was able to leave and return to China on two occasions without it harming his probationary status. It held that there was nothing to suggest that he could not do so again.

[13] I agree with Mr. Su that the Board's negative credibility finding concerning his interactions with the police impacted its assessment of an available IFA. If the Board is wrong on its risk findings, then Mr. Su is a person who is subject to a probationary status and will be required, at least once more, to go before his agents of persecution and will also be subjected to a three month period of detention for having failed to report. As such he is not merely a homosexual facing discrimination in his city. An IFA is not an alternative if one must face persecution in order to obtain permission to travel to the IFA.

[14] It is unreasonable for the Board to conclude that there was a less than mere possibility that he faced a risk of harm upon attending the police in order to relocate to and live in Shanghai if it is true that he was: (i) assaulted by the police when he was found kissing and coddling at the park on May 4, 2009; (ii) beaten, assaulted, stripped and forced to "perform" sexual acts by the police on each day while in detention between May 4 and 11, 2009; (iii) verbally abused by the police when he reported in accordance with his probation and paid the required fee on November 11, 2009; and (iv) beaten by the police to the point of requiring medical attention when he attended to make his second required fee payment on May 11, 2009. If these events occurred as was alleged, then the availability of an IFA and the risk to Mr. Su in returning to China takes on a much different colour.

[15] Mr. Su's claim for protection must be re-examined.

[16] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the applicant's claim for protection is to be determined by a differently constituted Board, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6273-11

STYLE OF CAUSE: CHIPENG SU v. THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: May 2, 2012

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

DATED: May 9, 2012

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