

Date: 20080527

Docket: IMM-4990-07

Citation: 2008 FC 675

Ottawa, Ontario, May 27, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

GANG TAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Gang Tan, a citizen of the Peoples Republic of China (PRC), challenges in this judicial review application the October 31, 2007 decision of the Refugee Protection Division (the tribunal) rejecting his claim for asylum on the grounds it did not believe his story.

[2] Mr. Tan says he fears the PRC's Public Safety Bureau (PSB) because he is a member of an underground Christian church which he joined in 2003. He states he attended on a regular basis,

once every two weeks, this illegal underground church, usually located in the home of another church member.

[3] He testified on July 4, 2005, the PSB raided the church but he was able to escape by running out the back door; he alleges he went into hiding and fled the PRC on November 9, 2005 after being told the PSB went to his home looking for him twice in order to arrest him. Shortly after arriving in Canada, he made his refugee claim.

The tribunal's decision

[4] The tribunal found, on the balance of probabilities, “that the claimant is not, nor has never been, a member of an underground church in the PRC”.

[5] It based its credibility finding on only two bases: it did not believe Mr. Tan's testimony why he joined the underground church nor did it believe his testimony on how, with the aid of a snakehead, he was able to clear security at Beijing's airport using a passport with his own name and photo identification.

[6] On the subject of why he joined the underground church, the tribunal wrote:

... the claimant indicated that he joined the illegal underground Christian church because he was depressed that he may lose his job, as others had lost theirs at his place of employment and that he could not send his child to school on just his wife's salary. I reject this explanation with regard as to why he joined an illegal organization: First, the claimant did not indicate in his Personal Information Form as to this or any other reason for joining; Second, the claimant did not lose his job; and Third, his wife is alone in the People's Republic of China and that their son is still attending school.

[7] On the issue of how the applicant was able to clear security at the airport using a passport, albeit fraudulent, with his own identification when the PSB was looking for him, the evidence was that his name would have been stored into a computer and his passport swiped at the security points at the airport which the applicant said he cleared using the services of a snakehead who had bribed all the customs officials. Mr. Tan was confronted with the fact his name would be in the computer and passport swiped. He answered his name was not in the computer because the snakehead told him that. The tribunal rejected his explanation in these terms and concluded:

Even if the snakehead could bribe officials and although the People's Republic of China does have a problem with corruption, I do not find it plausible that the smuggler would be able to bribe, possibly hundreds of officials, as there would be no guarantee as to which border police would be on duty or as to which line the claimant (and smuggler) would be directed to. I therefore find that the claimant was not a member of an underground Christian church and was not wanted by any Chinese authorities.

As no other reasons were put forward as to why the claimant fears persecution in the People's Republic of China, I therefore find that there is no serious possibility that the claimant will be persecuted or be subjected personally to a risk to his life or a risk of cruel and unusual treatment or punishment or to a danger of torture by any authority in the PRC.

The applicant's argument

[8] Counsel for the applicant advances two arguments: First, he submits the tribunal misread the evidence when it came to the factual conclusions it did and second, the tribunal erred in law when it failed to determine whether he was a Christian and to assess whether, as a Christian, he had a well-founded fear of persecution.

Analysis

(a) Standard of review

[9] The issue which arises is whether the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 impacts on the standard of review because that case folded into the reasonableness standard, the standard of patent unreasonableness. In the context of the issues in this case, my view is that *Dunsmuir*, above, has no impact.

[10] It is clear from this Court's jurisprudence that credibility findings are findings of fact to be assessed against section 18.1(4)(d) of the *Federal Courts Act* which provides this Court may grant relief in a judicial review application if it is satisfied a federal tribunal based its decision on "an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it". It has been recognized this statutory standard of review is equivalent to the common law standard of manifestly unreasonable. If section 18.1(4)(d) is breached, the tribunal's decision will of logic and necessity be unreasonable.

[11] Error of law not engaging the tribunal "home statute" are generally measured against the correctness standard. If the tribunal erred in law by failing to completely assess the applicant's fear, the tribunal's decision must be set aside because it was not correct.

(b) Discussion and conclusions

[12] My reading of the transcript leads me to conclude the tribunal arrived at its credibility findings by misreading the evidence and that its implausibility finding was impermissibly drawn. I come to this conclusion having in mind the tribunal's credibility findings should not be set aside

lightly because such findings are at the heartland of its jurisdiction and this Court cannot re-weight the evidence.

[13] The strongest basis the tribunal had for not believing the applicant is the implausibility of his being able to clear security at Beijing airport using a passport with his own name and photo I.D. if the PSB was looking for him because, in such a case, the applicant's name would be stored in a computer for verification.

[14] It is well recognized that a tribunal such as a panel of the Refugee Protection Division is well suited to draw implausibility findings provided the inferences drawn are not unreasonable (see *Aguebor v. Minister of Employment and Immigration*, [1993] F.C.J. No. 732 (C.A.)).

[15] After reviewing the transcript, I conclude the tribunal's implausibility finding was unreasonably drawn because it was arrived at without the tribunal taking into account all of the evidence before it.

[16] The applicant testified extensively on how he cleared officials at Beijing airport. His testimony was to the following effect:

- His passport was obtained by his smuggler. It was fraudulent; it was a Public Affairs passport which the Refugee Protection Officer (RPO) recognized was normally issued to Chinese government employees. It contained a Canadian visitor's visa

which the smuggler obtained from the Canadian Embassy by forging the applicant's name on the visa application form.

- He left Beijing with a group of people he did not know.
- He, his smuggler, arrived at the airport driven by his friend's car. His smuggler told him to wait in the car because "he had something to do; some matter to attend to."
- He came back to the car half an hour to 45 minutes later and told the applicant to follow him to gate 6 telling him he had "bribes through all this custom".
- He cleared three points: change ticket, security and customs which the RPO confirmed the documentary evidence substantiated there were three at Beijing's international airport.
- When the presiding member suggested to him his smuggler could not have bribed a hundred persons, he answered the smuggler said he just bribed at the checkpoint.
- The applicant could not recall if his passport had been swiped by security at the airport because he was too nervous; all he remembers is that security officials stamped his passport. He also answered the smuggler told him his passport had not been swiped.

- In answer to the question that the documentary evidence indicates his name would be put through a computer, he answered if the smuggler had not bribed customs he would never have passed through.

[17] On the basis of this evidence which the tribunal did not find incredible except on the basis of the overall implausibility, I can only conclude the tribunal could have drawn that finding by ignoring the evidence before it. The tribunal's finding was not based on the evidence but on pure conjecture that "the smuggler would have had to bribe possibly hundreds of officials without any guarantee as to which border police would be on duty or which line the claimant (or smuggler) would be directed to". On the evidence before him, it was equally, if not more plausible, the smuggler bribed that morning the customs officials at gate 6 where he told the applicant to follow him to and that his name was not swiped through the computer because he was in possession of a passport normally issued to government employees and contained a CVV.

[18] The tribunal based its only other credibility finding on three reasons, two of which do not stand up to evidentiary scrutiny. The tribunal did not believe the applicant joined the underground church because it did not believe his stated motive for joining it: his depression about possibly losing his job as others had and, if that happened, he could not afford to educate his son on only his wife's salary.

[19] The tribunal dissected the applicant's motive in two ways: he had in effect lost his job because he was now in Canada and yet his child was still in school. The transcript reveals he never told the tribunal he had lost his job but feared he might lose it and that his son was in school

because he was working in Canada and sent money home, his wife was working and his wife's relatives helped out (see Certified Tribunal Record, pages 523 and 536).

[20] Moreover, the tribunal's finding he was never a member of a Christian underground church in China was reached despite the fact the applicant was severely tested on his knowledge of Christianity which the RPO in argument acknowledged "he got most things correct" without the tribunal making a finding he had acquired his knowledge of Christianity while he was in Canada.

[21] In the light of the foregoing, I need not deal with the other basis counsel for the applicant argued the tribunal erred, that is, drawing on a line of recent cases dealing with refugee claimants from China alleging persecution on account of their Christian religion (see *Huang, Guobao v. the Minister of Citizenship and Immigration*, 2008 FC 132; *Li v. the Minister of Citizenship and Immigration*, 2008 FC 266), a tribunal errs when it does not assess whether an applicant was a practicing Christian based on the knowledge the claimant had about Christianity and, on this basis, had a well founded fear of persecution.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the tribunal's decision is set aside and the applicant's refugee claim is remitted to a differently constituted panel for reconsideration. No certified question arises from this decision.

“François Lemieux”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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