Federal Court  Cour fédérale

Date: 20090923

Docket: IMM-5132-08

Citation: 2009 FC 954

Ottawa, Ontario, September 23, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

YU YUN CHEN
YI CHEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Chen is a Chinese Christian. She seeks refuge in Canada for herself and her young son on the basis of religious persecution. She claims that her underground church was raided one day when she was not there, and that had she not been alerted and gone into hiding she would have been arrested.

[2] Although the Member of the Immigration and Refugee Board who heard her case accepted that she was a Christian, he did not believe the rest of her story. He preferred country documentation which indicated that in Fujian Province from where she hails, it is most unlikely that she would be persecuted given the size and type of church to which she belonged. He concluded: “I have carefully reviewed the documentary evidence and find, on a balance of probabilities, that the house church the claimant attended was never raided by the authorities and consequently, the claimant is not wanted by the [police]”.

[3] Counsel for Ms. Chen points out that there is other documentary evidence, some more recent than that cited by the Member, which suggests a clamp down in Fujian Province. This type of submission is repeated time and time again and is invariably met with a retort from the Minister that the Court is being asked to reweigh evidence. If it was reasonably open for the Member to prefer country conditions over the claimant’s testimony, then the decision should not be set aside. I agree with that submission as a general proposition. In this case, however, we simply do not know what was before the Member and what he took into consideration.

[4] Counsel for the Minister, who impeccably discharged her duty as an officer of the Court, stated that the application for leave was not opposed because the footnotes in the reasons for decision simply did not make sense. After leave was granted, the Tribunal, i.e. the Registrar of the Refugee Protection Division of the Immigration and Refugee Board, prepared the record for the parties and for the Court. The Registrar produced the documents as identified in the footnotes. Upon reviewing these documents, counsel was by then more than convinced that a number of the

footnotes were incorrect. The Board was duly informed that the record was incomplete and a supplementary record was attached correcting four footnotes and providing the missing material.

[5] After spending days sorting this out, counsel came to the conclusion that the errors in the decision were simply clerical errors in the footnoting. The Minister consequently took the position that the decision was reasonable and therefore opposed the judicial review. Counsel candidly pointed out, however, that leaving aside the citation for the *Immigration and Refugee Protection Act*; there were 15 other footnotes, 10 of which were wrong.

[6] Judicial review must be granted as one simply cannot tell what country documentation was before the Member and on what he relied. A document clearly relied upon was the *2007 British Home Office Report*. It had been, however, updated by a 2008 report as shown by the index to the Board's *National Documentation Package for China*. Counsel points out that the two reports are the same.

[7] With respect, that is not the point. It is simply fortuitous that there was no change in that report. If the Member was looking at the 2007 Report, who is to say he considered other reports authored subsequent to the 2007 Report which could be construed as casting a different light on the situation in Fujian Province. Procedural fairness demands that a decision be rendered after taking into consideration the entire record. By analogy, Rule 397 of the *Federal Courts Rules* provides that although clerical mistakes may be corrected at any time by the Court, the Court may reconsider an order if "…a matter that should have been dealt with has been overlooked or accidentally omitted." It sometimes happens, particularly with motions in writing under Rule 369, that the Duty Judge

rendered a decision on an incomplete record submitted by the Registry. In *Canada (Minister of Citizenship and Immigration) v. Dhaliwal-Williams* (1996), 116 F.T.R. 29, 34 Imm. L.R. (2d) 47, the Registry had received information relevant to a motion in writing but had inadvertently not placed it before the Court before it made its decision. The Court reconsidered the resulting order. So it must be in this case.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted.
2. The matter is referred back to another Member of the Refugee Protection Division of the Immigration and Refugee Board.
3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5132-08
STYLE OF CAUSE:	*Yu Yun Chen et al v. MCI*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 16, 2009
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
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