

Federal Court



Cour fédérale

Date: 20091216

Docket: IMM-5285-08

Citation: 2009 FC 1280

Ottawa, Ontario, December 16, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

WEI YANG

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (Board), dated November 12, 2008 (Decision), which refused the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant claims to be a citizen of the People's Republic of China (China) who claims a well-founded fear of persecution from the Communist regime and the Public Security Bureau (PSB) because of his political opinion as a practitioner of Falun Gong. The Applicant also alleges that he is a person in need of protection due to the risk he faces to his life or to cruel and unusual treatment or punishment in China.

[3] While in China, the Applicant reports having received a call from a friend saying that her husband had been arrested because he practiced Falun Gong. The Applicant went into hiding to avoid being arrested. While in hiding, he learned that the PSB had come to his home to arrest him.

[4] The Applicant came to Canada in December, 2006. He applied for refugee protection in January, 2007.

DECISION UNDER REVIEW

[5] The Board determined that the Applicant had failed to establish his identity as a national of China. The Board examined the results of the RCMP Counterfeit Bureau and determined that the documents provided by the Applicant were fraudulent.

[6] With regard to the Applicant's driver's license, the Board found that the "photograph" therein was made with coloured toner, such as a computer printer cartridge. The Board was also concerned about the lack of rickshaws in the laminate on the driver's license. The Board rejected the Applicant's explanation and determined that, based on its experience, the license was fraudulent.

[7] The Board also noted that there was no number in the *Hukou* provided by the Applicant and also that the *Hukou* had very few security features. The Board concluded that "since I find the driver's license is fraudulent, I must also conclude that the *Hukou* is as well..."

[8] The Board questioned the Applicant as to why he did not possess a resident identity card which is given to all citizens of China once they have reached a certain age. The Board did not accept the Applicant's explanation that his card had been taken from him.

[9] Furthermore, the Board was not convinced that the Applicant practised Falun Gong, since the Applicant was unable to answer basic questions about Falun Gong and failed to properly demonstrate a Falun Gong exercise.

ISSUES

[10] The issues that arise on this application can be summarized as follows:

- 1) Did the Board err by concluding that the Applicant had failed to prove his identity as a national of China?
- 2) Did the Board err in finding that the Applicant's story was not credible?

STATUTORY PROVISIONS

[11] The following provisions of the Act are applicable in these proceedings:

<p>Convention refugee</p> <p>96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, Boardship in a particular social group or political opinion,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p>(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p> <p>Person in need of protection</p>	<p>Définition de « réfugié »</p> <p>96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p>b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p> <p>Personne à protéger</p>
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97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

medical care.	médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(2) A person in Canada who is a Board of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
...	...
Credibility	Crédibilité
106. The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	106. La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[12] The following provision of the *Refugee Protection Division Rules*, SOR/2002-228 is also applicable in these proceedings:

Documents establishing identity and other elements of the claim	Documents d'identité et autres éléments de la demande
7. The claimant must provide acceptable documents	7. Le demandeur d'asile transmet à la Section des

establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them.

documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review” (*Dunsmuir* at paragraph 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[14] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[15] Post-*Dunsmuir* the Court has applied a standard of review of reasonableness to determinations of credibility. See *Huang v. Canada (Minister of Citizenship and Immigration)*,

2008 FC 1266, [2008] F.C.J. No. 1611. Accordingly, a standard of reasonableness is appropriate in considering both issues of this case: a) whether the Board erred in concluding that the Applicant had failed to prove his identity as national of China, and b) whether the Board erred in its conclusion with regard to the Applicant's practice of Falun Gong.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

Driver's license

[17] The Applicant submitted two pieces of identification to prove his identity, namely, a driver's license and a *Hukou*. He says the Board erred in its treatment of both these documents.

[18] The Applicant submits that the Board failed to consider the RCMP's forensic report in its consideration of the license. The forensic report determined that the authenticity of the license was

“inconclusive,” and that other than the use of toner, “the license, of limited security value, appears good.” Accordingly, the Applicant submits that the Board’s conclusion that the license was fraudulent is inconsistent with the results of the forensic report.

[19] Where the Board has expert evidence supporting an applicant’s claim, it is not entitled to reject this evidence in favour of a personal opinion without providing sufficient reasoning. See *Yu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 794, [2005] F.C.J. No. 988, *Armson v. Canada (Minister of Employment and Immigration)*(1989), 101 N.R. 372, 9 Imm. L.R. (2d) 150 (FCA), and *Perez v. Canada (Minister of Employment and Immigration)*, [1981] 1 F.C. 753 (FCA). The RCMP was asked in this instance to provide valuable evidence. It follows, then, that the Board cannot simply reject that evidence because it does not agree with the result. The Applicant submits that the Board erred by failing to consider the evidence before it.

Hukou

[20] Similarly, the Board erred in its treatment of the *Hukou*. The Applicant submits that the Board failed to consider the pertinent forensic evidence pertaining to the *Hukou*. Moreover, in its consideration of the validity of the *Hukou*, the Board determined that “since I find the driver’s license is fraudulent, I must also conclude that the *Hukou* is as well...”

[21] The evidence provided by the RCMP showed that the authenticity of the *Hukou* was “inconclusive,” and stated that “[t]here is no household number on the document, which is unusual,

but has been seen before.” Thus, the RCMP determined that the absence of a household number did not mean the document was necessarily fraudulent. The Applicant submits that the Board erred in making a negative determination with regard to the *Hukou* that was based on a misapprehension of the evidence.

[22] The Applicant submits that the Board’s finding that the *Hukou* was fraudulent is contrary to the forensic evidence provided by the RCMP. Accordingly, the Board should have provided reasons for distinguishing its finding from the evidence before it.

[23] Moreover, the Board states that because it found the driver’s license to be fraudulent, it must find the *Hukou* to be as well. The Applicant submits that the Board does not explain how a negative finding with regard to one document results automatically in the rejection of an other. Rather, each document should be considered separately because no evidence exists that suggests a link between the documents. See *Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1528, [2005] F.C.J. No. 1885.

[24] The Board’s Decision was based its disbelief of the Applicant’s identity and, specifically, on its findings with respect to the driver’s license, the *Hukou*, and the Applicant’s failure to produce a resident identity card. The Applicant submits that the Board erred by failing to consider the totality of his evidence when assessing his identity. See *Jiang v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1292, 68 Imm. L.R. (3d) 127.

Falun Gong

[25] The Applicant submits further that the Board also erred in failing to consider whether or not the Applicant was perceived to be a Falun Gong practitioner by the authorities in China. It was open to the Board to find that the Applicant is either not a Falun Gong practitioner or, in the alternative, a poor Falun Gong practitioner. Nonetheless, the Applicant submits that what matters is whether the authorities perceive him as a Falun Gong practitioner and, accordingly, if the risk of arrest exists. See, for instance, *Ward v. Canada*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1. The Applicant submits that if the authorities perceive the Applicant as a Falun Gong practitioner, whether he is a practitioner or not is irrelevant.

The Respondent

[26] The Respondent submits that the Board's Decision was reasonable and was based on the lack of acceptable proof of the Applicant's identity and his inability to answer some very basic questions with regard to Falun Gong.

[27] The Board's finding that the Applicant had not proven his identity as a national of China was reasonable. The Board found that both pieces of evidence the Applicant provided were fraudulent. It is open to the Board to conclude that identification documents are unreasonable because of anomalies and inconsistencies. When the Board is provided with evidence that contains both supporting and non-supporting information, it is entitled to choose the evidence it prefers. See,

for example, *Ganiyu-Giwa v. Canada (Minister of Citizenship and Immigration)*, 1995 F.C.J No. 506 at paragraph 2 (QL). Moreover, section 170 (h) of the Act states that the Board can base a decision on the evidence that is adduced by the parties and is considered credible or trustworthy.

[28] The Board's finding with regard to the license was also reasonable. The licence was printed with coloured toner and lacked the usual rickshaws in the laminate. Moreover, the *Hukou* did not have a number, and contained very few security features.

[29] The Respondent cites and relies on the case of *Larue v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 484 paragraph 11 (QL) which held that while some findings of the Board may be questionable when taken in isolation, where the totality of the evidence allows the Board to make a finding on credibility, a court should not interfere.

[30] The findings of the RCMP report were inconclusive. As such, the Board relied on its own specialized knowledge of having processed numerous refugee claims from China. The Board gave the Applicant the opportunity to respond to its concerns with regard to the documentation. However, the Board came to the conclusion that the Applicant's explanations were not sufficient.

[31] Since the Applicant had not proven his identity, the Board could have ended its analysis of the claim. However, in this instance the Board chose to continue its analysis with the Applicant's alleged practise of Falun Gong.

[32] It was reasonable for the Officer to expect the Applicant to perform the exercises correctly, since it was the basis for his claim. See *Lu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1233, [2006] F.C.J. No. 1534 at paragraph 8; *Liu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 595, [2007] F.C.J. No. 807 at paragraphs 7 and 8. The Board made a clear finding that the Applicant was not, and had never been, a Falun gong practitioner and there was no basis for his claim.

[33] In order to establish a fear of persecution, both an objective and subjective fear must be proven. See *Ward, supra*. The Board's negative finding of credibility makes the objective component irrelevant, since the subjective component has not been adequately proven. The lack of evidence with regard to the subjective element is enough to warrant dismissal of the claim. See *Mukharji v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 721, [2004] F.C.J. No. 911 at paragraph 30; *Ahoua v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1239, [2007] F.C.J. No. 1620 at paragraph 16.

ANALYSIS

[34] The Board found that "even if the claimant was a citizen of the People's Republic of China, I find, on a balance of probabilities, that the claimant is not, nor ever has been, a Falun Gong practitioner." Extensive reasons are provided for this conclusion and, given the Applicant's failure to demonstrate an exercise correctly, and his inability to answer even basic questions about Falun Gong, such a conclusion is entirely reasonable.

[35] The Applicant says that the Board committed reviewable errors with regards to his identity documentation and to his practice of Falun Gong.

While it is open to conclude that the applicant was not himself a Falun Gong practitioner, the question the panel next was required to consider, was whether, despite the Applicant's failure to demonstrate he is a practitioner, he was perceived as such by the authorities in China. It is submitted, that persecution is to be perceived from the vantage point of the persecutor rather than the applicant himself. Thus, the panel's failure to consider how the applicant would have been perceived by the authorities in China is a serious error of law.

[36] So the Applicant is saying that, even if he is not a Falun Gong practitioner, and never has been, the Board should have considered whether the Chinese authorities perceive him as such and whether he faces persecution and risk as a consequence of that perception. The Applicant says that the Board should have asked whether the Applicant associated with Falun Gong practitioners in China and should have made findings of fact on this issue.

[37] The problem with this argument is that the basis for the Applicant's allegation – that he is perceived as a Falun Gong practitioner and faces section 96 and 97 risks as a consequence of this perception – is that the Applicant actually is a Falun Gong practitioner. If he is not, then his whole narrative about what has happened to him in the past and the risks he faces in the future, falls apart. This is why the Board specifically found that there was “no credible basis to his claim” and that “the claimant has no fear of persecution” or “risk to his life nor to a risk of cruel and unusual treatment or punishment nor to a danger of torture in the People's Republic of China.” In effect, the Board makes a sweeping credibility assessment. See *Yang v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 971, [2003] F.C.J. No. 1236. The whole subjective basis for his refugee

claim disappears, which is sufficient for the claim to fail. See *Mukharji, supra*, at paragraph 30; *Ahoua, supra*, at paragraph 16.

[38] As the Applicant points out, the finding of the Board that the Applicant was not, and never had been, a Falun Gong practitioner, is an alternative finding.

[39] As regards the identity findings, however, it seems to me that the RCMP report was not favourable to the Applicant. The report found the authenticity of the driving licence “inconclusive,” so that the Board was at liberty to apply its own expertise and come to the conclusions it did after questioning the Applicant. The Applicant had been put on full notice that the Board was concerned about identity and that he would have to produce acceptable documentation or a reasonable reason for a lack of documentation. The transcript shows that the Board questioned the Applicant on these issues. The Decision explains why the Board found the documentation produced, and the reasons for not producing the resident identity card, unacceptable. I agree with the Respondent that, although the phrasing in the Decision is sometimes imprecise, the substance is clear and the Board provided a reasonable explanation for its findings on identity based upon the evidence before it, including the Applicant’s testimony. See *Qiu v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 259, [2009] F.C.J. No. 368 at paragraphs 6, 11 and 14.

[40] As regards the *Hukou*, the forensic report found that its authenticity was “inconclusive.” There was no household number of the document “which is unusual, but has been seen before.” The Board provides distinct reasons for rejecting the *Hukou*: there was no number on it; the Applicant’s

explanation was not satisfactory; country documents indicated that a number is placed on the *Hukou*; and the *Hukou* had very few security features. A reading of the Decision as a whole reveals that it was not simply rejected because the driving licence was rejected.

[41] The Board took the driving licence and the *Hukou* into account, but made much more of the fact that the Applicant had failed to produce his resident identity card and could not provide a reasonable explanation for his failure to do so.

[42] In the full context of the lack of acceptable identity documentation the Officer's rejection of the *Hukou* because it had no number and had very few security features is reasonable. The statement "since I find the driver's licence is fraudulent, I must also conclude that the *Hukou* is as well, as there is no number on it" should not be read out of context. When the Decision is read as a whole, my conclusion is that the Board is simply pointing out, albeit in a clumsy way, that the absence of a resident identity card, and an inauthentic driver's licence, do not provide much support for a *Hukou* with no number and no security features on it and which is probably inauthentic as well.

[43] In any event, the alternative ground stands alone. There was no subjective or objective basis for the Applicant's claim which was based upon an assertion that the authorities in China wanted to arrest him because he is a Falun Gong practitioner and had been practising on a daily basis since June of 2005. As the Board pointed out, there was no credible basis to the Applicant's claim.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is dismissed.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5285-08

STYLE OF CAUSE: WEI WANG
v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 26, 2009

**REASONS FOR
Judgment and Judgment:** RUSSELL J.

DATED: December 16, 2009

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