Federal Court  Cour fédérale

Date: 20100106

Docket: IMM-369-09

Citation: 2010 FC 9

Ottawa, Ontario, January 6, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ZHI JUN ZHANG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Immigration and Refugee Board's Refugee Protection Division (RPD or Board), dated December 2, 2008, wherein the applicant was determined to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant seeks an order pursuant to subsection 18.1(3) of the *Federal Courts Act*:

1. Declaring the applicant to be a Convention refugee;

2. In the alternative, an order remitting the matter to the Immigration and Refugee Board with directions;

3. In the further alternative, an order remitting the matter to a different panel of the Immigration and Refugee Board for a hearing *de novo*.

Background

[3] Zhi Jun Zhang (the applicant) claims that it was on the behest of a friend that he joined an underground church in China. The applicant is a citizen of the Peoples Republic of China. He claims refugee protection because he fears persecution because he is a member of an underground Christian church in China.

[4] The applicant arrived in Canada on August 20, 2006 on a student visa to attend Hanson International Academy. While in Canada, the applicant kept in contact with his friend in China and apprised of his religious activity. In October of 2006 the applicant began including prayer pamphlets in the letters to his friend.

[5] The applicant claims that while in Canada, his parents were visited by the Public Security Bureau (PSB) regarding his involvement in the underground church. The PSB told his parents that he was wanted for arrest and that he must return to China to report to the PSB office.

[6] The applicant applied for refugee protection on February 12, 2007 on the basis that because he attended an illegal church in China and sent religious materials to China, the applicant feared arrest, imprisonment and that he would not be able to practice his Christian faith freely and openly.

[7] It is alleged by the applicant that two fellow believers have been arrested since he left China and the PSB continue to visit his parents regarding his activities in Canada and his return date to China.

Board's Decision

[8] The Board began its decision by reviewing the evidence presented by the applicant in written and oral submissions. It was noted that the applicant attended the underground house church in China six or seven times between June 2006 and his August 20, 2006 departure for Canada. The Board found that the applicant's knowledge was consistent with someone who has attended services in Canada for the past two years. Further, the Board noted that a letter from Reverend Ko of the Living Water Assembly in Toronto indicated that the applicant had been baptized on March 17, 2007. The Board concluded that based on this evidence, on a balance of probabilities, the applicant

was a practicing Christian in Canada and that most of his knowledge was acquired after his arrival in Canada.

[9] The Board found that the key question in determining whether the applicant was a Convention refugee or a person in need of protection was whether the applicant, as a member in an underground Christian house church, would face a serious possibility of being persecuted, arrested and/or imprisoned by authorities in China. The Board found that the applicant had not satisfied the burden of establishing a serious possibility of this happening.

[10] The Board was dubious of the allegation that individuals attending underground churches were subject to persecution. The Board pointed to documentary evidence that indicated that prayer meetings and study groups among family and friends were not subject to raids unless they grew in size, attempted to converge with other church groups, and/or sought more permanent facilities. A membership of ten in the underground church that the applicant attended six or seven times was not consistent with a situation that would attract the attention of the PSB; the applicant did not describe himself as a church leader or prominent Christian which are factors that have been identified in documentary evidence as attracting persecution by the PSB. Further, the applicant did not provide any evidence of the membership growing or moving to different locations.

[11] In regards to the religious material that the applicant sent to his friend, the Board stated that there was no evidence presented that indicated that the PSB had confiscated the materials and no evidence such as receipts that these documents were ever sent.

[12] The Board then turned to the issue of whether the applicant would be able to practice his religion without risk of persecution in China and particularly the issue of whether the applicant would be able to practice his religion freely in registered churches. The Board found that the applicant had not provided any direct evidence to verify that the applicant would have to place the state above God in a registered church. The applicant's statement that this information came from a friend who he trusted was insufficient to the Board. The Board goes on to acknowledge that there is reference to this issue in the documentary evidence but finds that it is "not supported by any solid evidence". The Board stated that the assertion that "reports" found that registered churches being constrained by the state was insufficient proof if the source of those reports was not provided.

Issues

[13] The issues are as follows:

1. What is the standard of review?
2. Did the Board err in basing its decision on erroneous findings of fact and err in finding that the applicant should not be considered a person in need of protection under section 97 of IRPA?

Applicant's Written Submissions

[14] The applicant submits that the standard of review for decisions of the Board as a whole is subject to the standard of patent unreasonableness. Correctness is to be applied to questions of

law. The applicant cites *Divsalar v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 653 for the notion that "[t]he court is often just as capable as the Board in deciding whether a particular scenario or series of events described by the applicant might reasonably have occurred", cited from *Kapita v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1074.

[15] The applicant begins with credibility issues. The applicant notes that there were no negative findings on the applicant's general credibility. Further, the Board found that the applicant's testimony was consistent with someone who is a practicing Christian.

[16] The applicant submits that the Board was compelled to find in favour of the applicant when it decided that there would be no risk to the applicant after attending unregistered churches in China and after he disseminated by mail Christian literature. When there is no issue of credibility, "the benefit lies with the Applicant" (see *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.) at 305. The documentary evidence varies greatly from one locality to another however the government's general perception on unregulated religious groups is such that they target any challenge to their authority. The Board made a selective reading of the documentation that failed to address this fact. Further, the applicant should not be doubted on his allegations that authorities in his area are targeting members of unregistered churches. It is erroneous for the Board to find the applicant believable from a credibility perspective but also rejects his statements based on lack of solid evidence. Or in the alternative, the Board erred when it

placed more weight on documentary evidence that they found problematic insofar as providing substance to the allegations and then found that little weight could be given to the applicant.

[17] The Board failed to acknowledge facts presented by the applicant, namely: the risk faced by the applicant because he went to three different churches in China, because he mailed Christian material to China from Canada and because the church the applicant belonged to in Toronto has forged a link with underground churches in China.

[18] The applicant then was critical of the Board's findings on a lack of solid evidence or in other words, "making findings that are without evidentiary basis" (see *Zhou v. Canada (Minister of Citizenship and Immigration)*, IMM-3502-05, 25 January 2006 as per Madam Justice Snider). The applicant stated that the Board's treatment of the matter of the materials sent to China was erroneous as it ignores evidence. The applicant quotes the Department of State Country Report on Human Rights, China, issued March 11, 2008:

> By law, only government approved publishing houses were permitted to print books…[i]ndividuals who attempted to publish without government approval faced imprisonment, fines, confiscation of their books and other sanctions.

[19] The fact is that the Chinese government's censorship is not perfect and they may have missed the materials sent, however, this does not mean that the authorities might not find the materials in the future. The Board "minimizes the applicant's conduct" and the seriousness of the consequences in China.

[20] The Board notes that the leaders of the underground churches are more readily persecuted but fails to acknowledge that documentary evidence such as the US State Department Report, states that members are targeted equally with leaders.

[21] The applicant then turns to the Board's finding that the applicant can practice his religion at a state run church. It was irrational for the Board to find that there was not solid evidence that state run churches did not put the government over God because the statement made by the applicant can be true whether the applicant experienced it or not. It does not change the fact of the applicant's statement.

[22] The principle beliefs of the applicant is what "one must look at" (see *Zhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1066 and *Syndicat Northcrest v. Amselem*, 2004 SCC 47). The applicant's belief was that the state run Patriotic Church violated his religious convictions.

[23] The Board's reasoning is also completely irrational and unfounded when it suggests that the documentary reports are unsubstantiated. The material referenced is a summary of several documents from a wide variety of sources, called the RIR and including such documents as the US Department of State Religious Freedom Report and US Congressional Committee Reports.

[24] The material referenced states that the registered churches are constrained from making doctrinal statements; something the applicant sought to avoid by going to an underground church.

[25] The inferences made were not based on evidence as the significant and relevant parts of the claim are internally logical and that there is a connection between the activities of the applicant and the perception of the authorities towards the applicant and supporting country documentation. Where implausibility findings and inferences make up most of the reasons, a decision cannot stand. Inferences drawn must be reasonably said to exist.

[26] In regards to section 97 factors and whether the applicant would be at risk if returned to China, the Board fails to address the evidence appropriately says the applicant. The Board had an obligation to do a section 97 risk analysis in its reasons and failed to do so. The Board did not make adverse credibility findings and then failed to provide a coherent analysis of risk. The decision should fail for this reason. Board guidelines suggest that a section 97 analysis is essential even if the claim is rejected under section 96 of IRPA.

Respondent's Written Submissions

[27] The standard of review is reasonableness (see *Kabongo v. Canada (Minister of Citizenship and Immigration)* 2008 FC 348).

[28] The Board did not ignore or misconstrue evidence and is presumed to have taken all the evidence into consideration. The respondent submits that the Board reviewed all of the evidence regarding persecution of Christian house churches in China. It is not the case that the Board did not recognize that persecution of Christians does not exist in China.

[29] The respondent disagrees with the applicant on whether the Board made inferences that were in error. The respondent states that the main thrust of the applicant's arguments with regard to evidence is that the Board should have made alternate inferences than the ones the Board actually made and that the Board engaged in selective analysis of the evidence. In order for there to have been a reviewable error, the applicant must demonstrate that the inferences made by the Board are not supportable in any way on the evidence. Merely arguing that other inferences should have been made does not meet the standard of review and the deference afforded the Board (see *Sinan v. Canada (Minister of Citizenship and Immigration),* [2004] FC 87 at paragraph 11 and *Qasam v. Canada (Minister of Citizenship and Immigration),* [2002] FCT 1182 at paragraph 46).

[30] The respondent relies on *Conkova v. Canada (Minister of Citizenship and Immigration),* [2002] F.C.J. No. 300 for the idea that the issue at hand is essentially the Board's treatment of the whole of the evidence as it is often ambiguous and equivocal and that some elements support the applicant's position, others undermine it. The Board has the mandate of making conclusions based on this often elusive evidence as part of its expertise.

[31] The applicant is wrong to suggest that the Board did not make a finding based on section 97 of IRPA. The Board considered the applicant's story, personal circumstances and the documentary evidence as to the persecution of underground churches. Based on that evidence, it was concluded that the applicant did not face a risk of torture, risk to life or a risk of cruel and unusual treatment or punishment if returned to China. There is no merit to the applicant's argument in this regard.

Analysis and Decision

[32] **Issue 1**

What is the standard of review?

In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court stated that if the standard of review has been already determined, then no further analysis is required. *Dunsmuir* above, also collapsed patent unreasonableness and reasonableness *simpliciter* into one standard of review, that of reasonableness.

[33] In this case, the applicant raises questions of fact and questions of mixed law and fact. The former involves the Board's findings based on inferences, implausibilities and credibility findings. These findings are highly factual in nature. In numerous pre-*Dunsmuir* decisions, this Court has held that the appropriate standard of review was patent unreasonableness (see *Soosaipillai v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1349, 2007 FC 1040, at paragraph 9).

[34] In *Malveda v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 527, Mr. Justice Russell stated that “the issue of whether or not the Board ignored relevant evidence is also a factual inquiry and has been reviewed in the past on a standard of patent unreasonableness” (see also *Dannett v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1363, [2006] F.C.J. No. 1701 (QL) at paragraph 33).

[35] The final question raised by the applicant involved questions of mixed law and fact because it is related to the Board's findings on section 97 of IRPA in relation to the evidence put forward by the applicant. Questions of law and fact have been established by this Court to be reviewable on the standard of reasonableness (see *Kamilov v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 810).

[36] Therefore, the standard of review for all of the issues raised by the applicant is reasonableness. There have been no pure questions of law raised, which would warrant a review on the standard of correctness.

[37] The analysis by this Court is limited to reviewing the Board's decision to ascertain whether the decision was made 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 (see *Dunsmuir* above, at paragraph 47).

[38] The Supreme Court stated in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, at paragraph 59:

> There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[39] **Issue 2**

Did the Board err in basing its decision on erroneous findings of fact and err in finding that the applicant should not be considered a person in need of protection under section 97 of IRPA?

The applicant began with the premise that when there is no adverse credibility finding, the benefit lies with the applicant as established in *Maldonado* above. He then adopted this premise to the many pieces of evidence before the Board and argues that because they did not begin with this premise, the findings were in error. The Board should have looked at each piece of evidence through the lens of what the applicant said was true if they had found him credible. For the applicant this was an error that defeats many of the findings of the Board.

[40] I do not find fault with the Board's findings. The applicant is stating what he himself knows to be true. The Board has not disputed his belief in these things. What the Board disputes however, is whether his beliefs are an accurate reflection of the risk of persecution objectively. What I understood the Board to be stating was that there was no solid evidence to substantiate what the applicant was claiming. There is a distinction between finding an applicant not credible and the finding that despite what the applicant knows to be true himself, the statement claimed does not provide enough evidence to accept a statement as true on a balance of probabilities. For this reason, I am of the view that this was not an error of the Board.

[41] In this issue of the dissemination of materials, I find that the Board's conclusions were reasonable and did acknowledge the punitive approach the PRC was taking towards such materials. The conclusions of the Board were based on the evidence that, beyond the assertion made by the

applicant that the materials were found and seized by the PSB, there was no other evidence to substantiate this. The Board did not find an associated risk of persecution based on bare assertions, on a balance of probabilities. I find this reasonable. Mr. Justice Lemieux noted in *Tan v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 844:

> 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.)).

[42] This is an intelligible conclusion to make given that there were no receipts provided to prove that the materials were sent and that the applicant took measures to conceal their contents. While it is plausible for the Board to have concluded otherwise, that the PSB may have found or may discover the material, they did not make that finding. Re-weighing this evidence and making conclusions on it goes beyond the direction this Court has been given in judicial reviews of this nature.

[43] The next issues are in regard to how the Board treated the evidence of whether members of underground churches were persecuted or whether the targeting involved higher profile leaders and whether the registered churches placed the state above God.

[44] Again, the applicant made the argument that unless he was found not to be credible, his statement regarding registered churches which, came from discussions with his friend, should have

been accepted. I am not of the view that the Board had to accept this on this basis for the reasons I discussed above regarding credibility.

[45] I do not find that the Board erred when it reasoned that the state is not placed above God based on the applicant's discussion with his friend. The Board was not suggesting that the applicant was untruthful but that this was not enough direct evidence to conclude that this was this case. This is within the Board's discretion.

[46] Second, the applicant submitted that the Board ignored the documentary evidence and made irrational conclusions of the documentary evidence in relation to whether members of underground churches were persecuted and whether the registered churches placed the state above God.

[47] I too find it curious that the Board made conclusions based on this reasoning. The Board stated that "the article refers to "reports" but provides no source information". Essentially, the reports should be substantiated with "reports". In other words, the Board did not trust the information provided in the reports and was not convinced it was based on solid evidence. The Board uses this reasoning to conclude that on a balance of probabilities, the Chinese Patriotic Church does not place the government and the Communist Party above God.

[48] These reports are used commonly as reliable sources of information on country conditions and specific risks. In fact, this report was part of a package of documents on China compiled July 30, 2008 for the Immigration and Refugee Board of Canada: the Board's own reports. While there is

the caveat on the document that it does not offer conclusions as to the merit of a particular claim, I do not think that that satisfies the issue here.

[49] It was not the case that this only came up in one of the reports. The June 13, 2007 and April 27, 2007 Response to Information Requests (RIRs), the International Religious Freedom Report 2007, the Country Reports on Human Rights Practices 2007, and The Congressional-Executive Commission on China, amongst others, all made claims that suggested that doctrine in registered churches is controlled by the state and that members are also sometimes persecuted alongside leaders.

[50] I am of the view that the Board was wrong to dispute the claims in regards to the documentary evidence on this basis.

[51] Finally, the applicant made the argument that his principle beliefs are paramount quoting *Zhu* above, and *Syndicat* above. His beliefs, he submits, are compromised if forced to attend state run churches. In *Zhu* above, Mr. Justice Zinn found that the Board's conclusion that it was reasonable for the applicant to attend a state-sanctioned church based on the lack of sophistication of her beliefs was in error. Attending underground churches was a conviction itself in accordance with the applicant's beliefs. And *Syndicat* above, was a case decided by the Supreme Court of Canada where the subjectivity of religious convictions was acknowledged and upheld as the substance of our religious freedoms under the *Canadian Charter of Rights and Freedoms*. The

premise was essentially that: one need only have a nexus with a belief that had a religious quality to it. I agree with the statements of Mr. Justice Zinn.

[52] For these reasons, I find the Board's decision to be unreasonable and it therefore must be set aside and the matter referred to a different panel of the Board for redetermination.

[53] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[54] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	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 :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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;
(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.	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.
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	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) to a danger, believed on substantial grounds to exist, of	a) soit au risque, s'il y a des motifs sérieux de le croire,

torture within the meaning of Article 1 of the Convention Against Torture; or

d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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

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

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

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

(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,

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

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

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

(2) A person in Canada who is a member 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.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-369-09
STYLE OF CAUSE:	ZHI JUN ZHANG - and - MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 7, 2009
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	January 6, 2010

APPEARANCES:

Marvin Moses	FOR THE APPLICANT
Suran Bhattacharyya	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Marvin Moses Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT