

Federal Court



Cour fédérale

Date: 20100318

Docket: IMM-5461-08

Citation: 2010 FC 310

Ottawa, Ontario, March 18, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YU, WEN QIANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to s. 72 of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, of a decision by the Refugee Protection Division of the Immigration and Refugee Board which found that the applicant was neither a Convention refugee nor a person in need of protection within the meaning of the Act. For the reasons that follow, this application is dismissed.

Background

[2] Wen Qiang Yu, a citizen of the People's Republic of China, lived in Fujian Province prior to entering Canada.

[3] Mr. Yu is a Christian. His parents have been Christians since he was young, but he did not become a Christian until recently. In September 2006, a friend invited him to an underground Protestant house church. Mr. Yu became a member of this church, which held services at the homes of its members once or twice a week.

[4] Mr. Yu claims that on November 5, 2006, the Public Security Bureau (PSB) raided the house church gathering that he was attending. Mr. Yu states that a lookout system in place allowed him and other members to escape, and that he immediately went into hiding. He says that on the following day, the PSB went to his family's house and "alleged that [he] had participated in illegal religious activities." Mr. Yu also states that a number of church members were detained, and that one of these detainees revealed his name to the authorities. Mr. Yu claims that the PSB searched his house and threatened his parents seeking to obtain information on his whereabouts.

[5] Mr. Yu remained in hiding, fearing that if he were caught he "would be severely punished for illegal religious activities, and arrested and imprisoned." He made arrangements to come to Canada with the assistance of a human trafficker. Mr. Yu arrived in Canada on December 17, 2006, and on January 8, 2007, he made a refugee claim. Mr. Yu claims that since coming to Canada, his

parents have continued to be harassed by the PSB who continue to look for him because of his Christian activities.

[6] On August 27, 2008, the Board rejected Mr. Yu's refugee claim. The Board accepted that the applicant was a Christian, and that he attended underground gatherings at a house church. However, the Board stated that "the determinative issue in this case is whether it is credible that the claimant is sought by the authorities because he is a member of an underground Christian Church in Fujian, China."

[7] The Board reviewed extensive documentary evidence on religious persecution in China and concluded that "religious persecution of Protestant 'house churches' does occur" but that it was less likely that such persecution took place in Fujian Province as it was more liberal in its approach to such churches. The Board noted that the documentary evidence on persecution in Fujian Province was "extremely limited." The Board drew a negative inference from this lack of documentary evidence, stating:

... since there is a significant amount of information, detailing very specific examples from areas much more remote and difficult to access than Fujian ... it is reasonable for the panel to expect to see persuasive evidence which would support the allegation of Protestant 'house churches' being raided and individuals being jailed in Fujian province.

[8] The Board went on to review the factors that tended to be present when there was persecution of house church members. The Board found that these factors did not apply to the applicant. Based on its review of the documentary evidence, and without specifically stating that it

found the applicant not to be credible, the Board concluded that the applicant did not have an objectively well-founded fear of persecution. The Board determined,

... based on a balance of probabilities, that the church group that [the applicant] attended was not raided and therefore, no one has been jailed, nor is the PSB looking to arrest and imprison him for illegal religious activities. The panel's determination is based on a preference of the documentary evidence over the claimant's evidence.

[9] The Board went on to “determine if the claimant were to return to China, would he be able to practice his religion without risk of persecution?” The Board asked the applicant why he did not attend a government approved church that was registered “with the appropriate ‘patriotic association’.” The applicant testified that “the registered church stressed worship of the Chinese Communist Party over God and that he had learned this from pamphlets and the underground organizer.” The Board determined that Christians in China are able to freely worship at registered churches. The Board noted that the documentary evidence could not confirm the applicant's allegation that the registered churches stressed worship of the Chinese Communist Party over God. The Board concluded that “it cannot be accepted that the claimant would be prevented from practicing his religion at a patriotic church if he were to return to China.”

[10] The Board also concluded, based on the lack of documentary evidence suggesting house church persecution in Fujian Province, that “if the claimant were to practice his religion in an unregistered ‘house church’, with which the claimant was associated prior to coming to Canada”, he would not face a serious possibility of persecution. Consequently, the Board rejected the applicant's refugee claim.

Issues

[11] The applicant in his memorandum raises the following issues:

1. Whether the Board erred in its findings concerning the practice of Christianity in China;
2. Whether the Board erred in preferring a lack of documentary evidence over the Applicant's otherwise credible evidence;
3. Whether the Board erred by misconstruing evidence and by ignoring relevant evidence in finding that there are no incidents of arrest in Fujian Province; and
4. Whether the Board erred in relying on documentary evidence without making specific findings about the truthfulness of the Applicant's account of events.

[12] In my view, the proper characterization of the issues raised by the applicant are the following:

1. Whether the Board erred in concluding that the applicant could freely practice his religion in a patriotic church; and
2. Whether the Board erred in relying on documentary evidence regarding the consequences of practising Christianity in Fujian Province in preference to the applicant's evidence without making specific findings about the truthfulness of the applicant's account of events.

Analysis

- i) Whether the Board erred in concluding that the applicant could freely practice his religion in a patriotic church.*

[13] The applicant said that he could not practice his religion in a patriotic church because those churches put the state above God. The applicant asserts that the Board erred in concluding that he

could freely practice his religion in a patriotic church because it failed to properly consider documentary evidence and jurisprudence that supported his assessment of the priority given the state in such churches.

[14] The respondent submits that the Board's conclusion was reasonable because the applicant did not lead any direct evidence to support his assertion and because the cases he relies on are distinguishable.

[15] The Board failed to consider several key pieces of evidence that supported the applicant's assertion that he could not freely practice his religion at a patriotic church. A 2007 report by the U.S. Department of State noted reports that patriotic church "theology places submission to the state's authority above submission to Christ's authority." A 2007 IRB Response to Information Request notes "reports that patriotic organizations sometimes interfere in doctrinal decision of registered religious groups." A 2005 IRB Response to Information Request notes the Chinese government's "'Theological Construction Campaign' which was implemented in official Protestant seminaries," and that this campaign led to the proliferation of house churches.

[16] It is trite that the more contradictory the evidence, the more likely a decision-maker's failure to consider that evidence will amount to a reviewable error: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35. The respondent argues that the Board's failure to consider this evidence does not amount to a reviewable error because the applicant failed to lead direct evidence and because the Board's reasoning regarding the more "liberal" approach to

religion in Fujian Province outweighs the failure to consider the documentary record. I do not agree.

[17] While it is preferable to have direct evidence, there is no obligation on a claimant to lead direct evidence in support of the allegations made. In particular, there was no obligation for the claimant in this case to attend a patriotic church to see for himself whether the church preached worship of the Chinese Communist Party over God. Where the documentary record supports a claimant's allegations, and those allegations are found to be credible, this alone is sufficient.

[18] The applicant stated before the Board that he could not attend a patriotic church "because that type of church stresses the worship of the party above the worship of God. That type of church violates the first commandment of the Ten commandments." The Board did not probe the applicant's belief in the importance of the first commandment, and made no negative credibility finding with respect to this belief. In fact, the Board found that he was a practising Christian.

[19] It was an error to rely on the absence of direct evidence, as the Board did in this case, where the documentary record supported the applicant's allegations. While the Board's discussion of religious persecution in Fujian Province is relevant to the issue next addressed, it is not helpful to this discussion. The Board failed to consider contradictory evidence that supported the applicant's allegations, and the decision is unreasonable on this basis.

[20] The applicant cites *Song v. Canada (Minister Citizenship and Immigration)*, 2008 FC 1321, *Zhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1066, and *Zhou v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1210, as recent examples where this Court has quashed Board decisions on the basis that the documentary record supported distinctions between the theological practice of patriotic churches and house churches, and therefore supported the allegation of restrictions on the claimant's freedom of religion if they were expected to practise their religion in a patriotic church.

[21] The respondent attempts to distinguish *Zhu* and *Song*. The respondent submits that in *Zhu*, the Board's decision was overturned because the Board failed to consider the claimant's religious conviction; the respondent argues that in this case, the Board considered the applicant's religious conviction, but determined that he would be able to practise freely at a patriotic church. The respondent submits that the decision in *Song* was based on the "cumulative impact" of a number of errors and not on the basis of the Board's finding regarding patriotic churches alone.

[22] Every case is different and is composed of a unique documentary record. One should be cautious in applying country findings from one decision of this Court to another. Nonetheless, the thrust of the decisions cited by the applicant is that many individuals are not able to practise their religion freely in patriotic churches. The respondent is correct that in *Song* the Board's decision was overturned because of cumulative errors. The respondent is also correct that in *Zhu*, the Board's decision was overturned because the Board failed to consider the claimant's religious conviction. The present case is akin to *Zhou*, where the Board's decision was overturned because it

failed to consider evidence that supported the claimant's allegation of theological difference between patriotic churches and house churches.

[23] For these reasons, I find that the Board's decision that the applicant could freely practice his religion in a patriotic church was unreasonable.

ii) Whether the Board erred in relying on documentary evidence regarding the consequences of practising Christianity in Fujian Province in preference to the applicant's evidence without making specific findings about the truthfulness of the applicant's account of events.

[24] The applicant submits that the Board's preference for the documentary evidence over the applicant's testimony was unreasonable because it had found him to be credible. He says that the Board failed to make any negative credibility findings and none of the documentary evidence cited by the Board suggested that the authorities are *not* persecuting Christians in Fujian Province. Further, the applicant submits that it is an error to rely on documentary evidence suggesting diminished risk of persecution in a particular geographical area without first making specific findings regarding the truthfulness of the claimant's allegations: *Lin v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 254.

[25] The respondent submits that it was reasonable for the Board to rely on the dearth of documentary evidence regarding persecution in Fujian Province, relative to the plethora of evidence from elsewhere (including equally remote provinces) documenting religious persecution, to conclude that the raid on the applicant's house church did not happen. Additionally, the respondent

contends that the Board's discussion and application of the factors that tended to increase the risk of persecution in Fujian Province was legitimate, and that the Board's conclusion that the applicant and his church did not possess these factors further supported its finding that the incidents of persecution did not happen.

[26] The applicant is correct in asserting that "when an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness:" *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.). From this it follows that if the Board has reasons to doubt the overall truthfulness of a claimant's evidence it is "under a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms:" *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.). (emphasis added)

[27] In this case, the applicant correctly notes that the Board made no explicit negative credibility finding regarding his testimony. Rather, he submits, the Board preferred the documentary evidence and concluded "based on a balance of probabilities, that the authorities did not raid the gathering." He submits that this finding was only open to the Board if it first provided reasons for finding his evidence to be not credible. I do not accept the applicant's submission.

[28] A fact finder, when presented only with the oral testimony of a witness, may find that witness generally not to be credible. If so, then his evidence will be given little, if any, weight. The fact finder will want to see or hear other evidence that supports a "fact" testified to by such a

witness, before finding that it is a fact. In short, where the only evidence of a fact is a statement of a witness who has been found not to be credible, it is open to the fact finder to say that the fact has not been proven on a balance of probabilities. That was not the case here as Mr. Yu was found to be credible with respect to those parts of his evidence relating to his Christian beliefs.

[29] Alternatively, the trier of fact may find the witness to be credible and accept everything said by the witness without corroborative evidence. This should only happen when there has been no evidence presented to bring into question any part of that witness' evidence.

[30] If evidence has been led that casts some doubt on the truthfulness of the testimony of that witness, then the fact finder must undertake an assessment of all of the evidence on the issue and reach a conclusion.

[31] In this case, the only evidence that was provided to the Board that the applicant's house church was raided was his own testimony. There was no corroborative evidence of any sort provided. Although he had otherwise been found credible, in that the Board accepted his evidence that he was a Christian and attended a house church in Fujian, there was other evidence before the Board that brought his evidence of the raid into question.

[32] The other evidence was documentary evidence. It was not directly contradictory of the applicant's testimony in that it did not say that no house churches had ever been raided in Fujian Province. That is hardly surprising as one is unlikely to find a report that something has not

happened because it is events, not non-events, that are reported. Nonetheless, the documentary evidence does lead to an inference that no such raid occurred. It leads to this inference, as the Board noted, for many reasons, including the following:

1. There is a large discrepancy in the treatment of house churches in China. In some parts of the country house churches with large memberships meet openly with no objection, while in other areas, house churches with small memberships are targeted by the authorities.
2. Protestant Christians who attempt to meet in large groups, or who travel within China and outside China for religious meetings are more likely to be targeted by authorities.
3. There is documentary information of religious persecution of house churches and their adherents from many areas of China, including many remote areas, but there is little such evidence of such persecution in Fujian Province.
4. The evidence of religious persecution in Fujian Province that exists relates to the Catholic Church.

[33] In this case, the Board chose to accept the independent documentary evidence over the applicant's testimony. It is evident from a reading of the decision as a whole that it did so because it preferred the evidence from "a large number of different commentators ... none of whom have a personal interest in the pursuit of an individual claim for protection" to the applicant's evidence in support of his own claim for protection. Its weighing of the evidence on this basis cannot be said to be unreasonable. Having formed the view that the documentary evidence was stronger and was to

be preferred, it did not need to make any explicit finding that the applicant's evidence on this point was not credible; it did so indirectly.

[34] The Board therefore concluded that the alleged persecutory events had not been proven to have occurred. The Board based that conclusion on (1) the paucity of documentary evidence suggesting religious persecution in Fujian Province, and (2) the evidence that where religious persecution had taken place, certain factors were present that put people at greater risk. Because those factors were not present in the applicant's case, the Board reasonably concluded that it was unlikely that he was at risk of persecution.

[35] The applicant also challenged the Board's characterization of his house church. The Court was specifically directed to the transcript of the applicant's oral testimony. However, it is noted that the applicant also affirmed, under oath, the truth of his Personal Information Form wherein he provides much greater detail concerning the house church and its ten adherents. Having reviewed the evidence that was before the Board, I find that its assessment of the character of the applicant and his house church was reasonable.

[36] While the Board erred in its finding that the applicant could freely practise his religion at a patriotic church in China, it does not automatically follow that the decision must be set aside.

[37] It flowed from the Board's finding that, on the balance of probabilities, the applicant's house church was not raided by the authorities, that "the evidence does not support that there is a serious

possibility for fearing persecution if the claimant were to practise his religion in an unregistered 'house church' with which the claimant was associated prior to coming to Canada.”

[38] Therefore, the result that there was not a serious possibility that the applicant would be persecuted or that he would be subjected personally to a danger of torture or to a risk to his life, or a risk of cruel and unusual treatment or punishment should he return to his country of origin was a reasonable conclusion. As such, the denial of the applicant's refugee claim was reasonable and cannot be set aside.

[39] Neither party proposed a question for certification and in my view there is none.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and
2. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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**REASONS FOR JUDGMENT
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DATED: March 18, 2010

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