

Federal Court



Cour fédérale

**Date: 20130117**

**Docket: IMM-6038-12**

**Citation: 2013 FC 42**

**Ottawa, Ontario, January 17, 2013**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**ZHANG, HAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant seeks judicial review of a negative refugee determination rendered by the Refugee Protection Division of the Immigration and Refugee Board (“the Board”) on May 17, 2012.

[2] For the reasons that follow, the application for judicial review is allowed.

I. Background

[3] The Applicant is a Chinese citizen who came to Canada in June 2010 on a study permit. He submitted his claim for refugee protection in October 2010 on the basis of his fear of persecution for his Christian beliefs and participation in an underground church in his home province of Fujian.

[4] The Applicant first attended his underground church in China in March 2009, and was baptized a few months later. When he arrived in Canada for his studies, the Applicant joined a church and informed two of his fellow members of the underground church about his Canadian church activities. In September 2010, the Applicant's parents informed him that the Public Security Bureau (PSB) had raided a service of his underground church, and had caught some of the members. The PSB subsequently paid the Applicant's parents five visits, purportedly demanding the return of the Applicant to China, informing his parents that he had been involved in an illegal underground church, recruited a new member, and sent Canadian church information to the Chinese church.

[5] The Board accepted that the Applicant was a practising Christian, and that he had been a member of both an underground church in China and a church in Canada. It identified the determinative issue as one of credibility with respect to the Applicant's fear of persecution, and determined that the Applicant was not a credible witness in this regard. Specifically, the Board drew a negative credibility inference from the absence of a summons in the Applicant's case. It further determined, based on the documentary evidence, that the PSB had not raided the Applicant's church, that no members of the church were arrested or detained, and that the Applicant was not

sought for arrest. As such, the Board found that the Applicant would not face a serious possibility of persecution should he return to practise at an underground Christian church in Fujian.

## II. Issues

[6] The issues raised by the Applicant can be articulated as follows:

- A. Whether the hearing was conducted in accordance with the principles of procedural fairness; and
- B. Whether the Board erred in its credibility assessment.

## III. Standard of Review

[7] Questions of procedural fairness, such as our first issue here, are to be assessed on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at para 43).

[8] Questions of credibility are worthy of significant deference to the Board, and are to be reviewed on the standard of reasonableness (*A.M. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 964, [2011] FCJ No 1187 at para 20). Reasonableness is concerned both with the existence of justification, transparency, and intelligibility in the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

IV. AnalysisA. *Procedural Fairness*

[9] Section 170 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) sets out the rules that the Board must follow in refugee cases:

Proceedings

**170.** The Refugee Protection Division, in any proceeding before it,

(a) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;

(b) must hold a hearing;

(c) must notify the person who is the subject of the proceeding and the Minister of the hearing;

[...]

(e) must give the person and the Minister a reasonable opportunity to present evidence, question witnesses and make representations;

[...]

(g) is not bound by any legal or technical rules of evidence;

Fonctionnement

**170.** Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :

a) procède à tous les actes qu'elle juge utiles à la manifestation du bien-fondé de la demande;

b) dispose de celle-ci par la tenue d'une audience;

c) convoque la personne en cause et le ministre;

[...]

e) donne à la personne en cause et au ministre la possibilité de produire des éléments de preuve, d'interroger des témoins et de présenter des observations;

[...]

g) n'est pas liée par les règles légales ou techniques de présentation de la preuve;

[...]

[...]

[10] As the Supreme Court noted in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39:

[28] [...] The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[11] Similarly, the Federal Court of Appeal described that, in the context of a hearing conducted by the Refugee Protection Division, fairness “requires that claimants be given an adequate opportunity to tell their story in full, to adduce evidence in support of their claim, and to make submissions relevant to it” (*Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2007] FCJ No 734 at para 39).

[12] The Respondent is correct in underlining that the Board is “master in its house” and has the authority to adopt the procedures it sees fit, within the limitations of procedural fairness (*Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at para 16). In addition, a Board member is entitled to narrow the scope of questions that he or she asks in the hearing - to focus on areas of concern in the application. Indeed, in *Zhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 279, [2011] FCJ No 323, I concluded that the Board was entitled to considerable latitude in how it conducts its hearings (see para 20). In that case, there was no evidence that the Member’s direction on how to proceed interfered with counsel’s ability to adduce relevant evidence. I note as a side bar that counsel in that case was also Ms. Crawford. However,

the Board's latitude to determine the procedure in hearings before it must be weighed against the Applicant's right to have an adequate opportunity to tell his story in full, and I believe that *Zhong*, above, is easily distinguished from this case on the facts.

[13] I am not satisfied, on the facts of this case, that the Applicant's opportunity to present his case fully was respected. While the Board Member could limit his questions to what he perceived to be a weakness in the Applicant's application, he prevented the Applicant from telling his story in full. The Board drew a negative credibility inference from the want of a summons in the record, but never once asked the Applicant to explain this absence. Additionally, the Board determined that the Applicant was not a credible witness with respect to his pursuit by authorities in China, but, apart from a few yes or no questions about the basis of his claim, did not allow the Applicant to speak to this issue. In so doing, the Board breached its duty of procedural fairness.

[14] In the end, the result may be the same, but after carefully reviewing the transcript and the facts surrounding the apparent haste with which this matter was handled, I am of the view that the Applicant is entitled to a more fulsome hearing. Further, the hearing transcript is not sufficiently detailed for me to conclude that there is no merit in sending the matter back for redetermination, had I been inclined to exercise the discretion of the Court in this regard.

[15] Given my findings on this issue, it is unnecessary to address the second. The Applicant's refugee claim will be sent back for redetermination by a different Board Member.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed and the matter is remitted to a newly constituted panel of the Board for redetermination.

“ D. G. Near ”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-6038-12  
**STYLE OF CAUSE:** ZHANG, HAN v MCI

**PLACE OF HEARING:** TORONTO  
**DATE OF HEARING:** JANUARY 8, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** NEAR J.

**DATED:** JANUARY 17, 2013

**APPEARANCES:**

Ann Crawford FOR THE APPLICANT  
Margherita Braccio FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Ann Crawford FOR THE APPLICANT  
Barrister & Solicitor  
Toronto, Ontario  
  
William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Toronto, Ontario