

Federal Court



Cour fédérale

Date: 20150629

Docket: IMM-4258-14

Citation: 2015 FC 790

Ottawa, Ontario, June 29, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**ZHUHAO CAO
(A.K.A. ZHU HAO CAO)**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Refugee Protection Division of the Immigration and Refugee Board [Board] denied the applicant's, Zhuhao Cao, claim for protection as a Convention refugee and as a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] on April 28, 2014, finding that there was no credible basis for his claim. He now seeks judicial review of the decision pursuant to section 72 of the Act.

[2] The application for judicial review is dismissed for the reasons which follow.

Background

[3] Mr Cao is a citizen of the People's Republic of China who recounts that his fish farm, a joint venture with his uncle, was expropriated and the compensation offered was inadequate. The applicant, his uncle and others protested. Although the applicant escaped when the police arrived, his uncle was arrested. The applicant states that his uncle was sentenced to four years in jail for inciting the protest. The applicant claims that he was accused of inciting the protest and a summons was left at his family home ordering him to submit himself to the police. He left China, travelled by way of Hong Kong, San Francisco and Seattle, then crossed into Canada, and travelled to Toronto where he claimed refugee protection.

The Decision

[4] The Board concluded that there was no credible basis for his claim; the applicant had not established credible or trustworthy evidence to find that there was a serious possibility of persecution if he were to return to China.

[5] The Board noted that the applicant's testimony was inconsistent about his travel and departure from China, his Resident Identity Card [RIC], the issuance of his passport, whether his US visa was improperly obtained, and the identity and role of his smuggler or smugglers.

[6] The Board found it was not credible that the applicant would have been able to use his RIC to obtain an exit permit without being detected and to depart without incident if he had been wanted by the Public Security Bureau [PSB], as he claimed. The Board also noted the coincidence that the applicant's passport was issued the very day he received a notice of expropriation and rejected his explanation that he obtained a passport because he planned to travel to celebrate the New Year, but changed his plans once the expropriation troubles began.

[7] The Board noted the applicant's confusing and evasive testimony about his smugglers and the amendment to his Personal Information Form [PIF] to indicate that Mrs He, his smuggler, had met him in Seattle and escorted him to Canada, rather than the earlier description that Mrs He had arranged his ticket and brought him from China to Hong Kong and that another smuggler, Ms Jin, had accompanied him to Hong Kong and escorted him through the airport. The Board also noted the applicant's references to "we" and "us" were not consistent with the applicant travelling alone. The Board concluded that the applicant did not use a smuggler to exit China.

[8] In addition to noting the applicant's confusing responses regarding his RIC, the Board found that it was not credible that he would be able to obtain an exit permit without presenting his RIC, whether or not he was aided by a smuggler.

[9] The Board noted that the applicant spent four months in hiding before leaving China which was not consistent with a subjective fear. The Board found that this, combined with the testimonial inconsistencies and the documentary evidence regarding RICs, led to the conclusion

that the applicant was not wanted by the PSB for inciting a protest. The Board found that on a balance of probabilities, although the RIC identifies the applicant as a citizen of China, his passport indicates that he departed in December 2011 and the Notice of Expropriation indicates that the fish farm was expropriated, these documents do not establish that he was wanted by the PSB.

[10] The Board then considered the merits of the applicant's claim, as an alternative assessment.

[11] The Board reviewed the documentary evidence, noting it to be mixed. It noted that arrest warrants are not always issued, but concluded that an arrest warrant would have been left with the applicant's family if he were wanted, given the applicant's claim that the PSB had visited his family home looking for him many times. The Board then found that the applicant's testimony was not consistent with the documentary evidence about the ruthlessness of the PSB and was not credible.

[12] The Board attached little weight to the applicant's testimony that his uncle remained in jail and to the jail visiting card, which indicated his uncle's four year sentence. The Board noted that the jail card was a photocopy dated February 2012.

[13] With respect to the applicant's section 97 claim, the Board found that he may face prosecution for inciting a protest about his expropriation, but that this does not constitute persecution. The Board found that there was no evidence that the government's action to

expropriate the farm was based on a Convention ground. The Board noted its concerns about the authenticity of some documents but then found that the applicant was investigated by the PSB for a crime of general application, i.e., organizing a protest due to the inadequate compensation offered, and not because he held a particular political opinion.

[14] Although he could be prosecuted and could face up to three years at a labour camp, the Board found this to be incidental to the lawful sanctions imposed in China. The Board noted that Chinese penalties may be harsher than those that would be imposed in Canada, but would not offend international standards.

The Applicant's Submissions

[15] The applicant submits that the Board made unreasonable and unintelligible credibility and implausibility findings and conducted an unreasonable alternative analysis.

[16] The applicant points out that there was no inconsistency in his testimony about his RIC. He provided a reasonable explanation and responded to the Board's confusing question. His request for clarification should not lead to a negative inference. Moreover, in his screening form he did not state that he had the RIC in his possession.

[17] There is also no inconsistency in his evidence about his departure from China. He indicated that he had difficulty leaving China due to his fear, yet the Board moved on to another question. This is not inconsistent with his later testimony about the role of the "snakehead" who facilitated his exit.

[18] The applicant also notes that his amended PIF corrected misinformation that he had travelled by car to Hong Kong; therefore the Board erred in finding an inconsistency.

[19] The applicant also explained his testimony about his US visa. Although he gave false information to obtain the visa, he did personally attend to obtain the visa and he first indicated it was improperly obtained for this reason.

[20] The applicant argues the Board unreasonably concluded that either the smuggler could not plausibly walk through security at the airport (as a non-passenger), without any evidence to make such a conclusion, and alternatively to conclude that there was no smuggler.

[21] With respect to the Board's conclusions that the applicant would have been required to show his RIC to obtain an exit permit, the applicant argues that this is a mistake of fact by the Board because the Response to Information Request (RIR CHN103754.E, 7 July 2011) cited by the Board does not indicate that a RIC is required for an exit permit.

[22] The applicant also submits that the Board's findings regarding his lack of subjective fear were unreasonable. He remained in China in hiding for four months because he was waiting for his visa. Once it was issued, he left within a few weeks. With respect to the timing of his receipt of his passport, he reasonably explained his intention to travel over the New Year.

[23] The applicant further argues that the decision is internally inconsistent and that the alternative assessment is not an alternative, given that the Board relies again on its credibility

findings. In addition, the Board's findings that the PSB would not have simply left a summons if they were in pursuit of the applicant is speculative and inconsistent with the documentary evidence, including RIRs, which indicate that the PSB rarely uses arrest warrants and that there are variations across the country regarding how the law is enforced.

[24] The Board's findings that the actions of the PSB as described by the applicant were not consistent with expectations are based on speculation and conjecture.

[25] The applicant also submits that the Board unreasonably found the jail visiting card to have low probative value. Although the original would have been preferable, the jail card, issued in 2012, indicated his uncle's four year sentence.

[26] Alternatively, the applicant argues that the Board erred in finding that there was no nexus between his fear of returning to face the consequences of his actions following the expropriation of his land and a Convention ground. The Board should have considered whether his resistance amounted to implied political dissent. The applicant submits that there is no recourse against forced expropriations in China and that all protests, including those protesting inadequate compensation, are regarded as protests against the government for its policies.

[27] Finally, the applicant argues that the Board erred in finding that he was not a person in need of protection. The documentary evidence shows that those arrested in China are at risk of torture and inhumane treatment. Therefore, the Board's finding that his risk of three years or more at a labour camp was simply the consequence of his unlawful act was perverse.

The Respondent's Submissions

[28] The respondent submits that the Board reasonably found that the applicant was not credible; however, even if he were found to be credible, he feared prosecution for his role in inciting a protest and not persecution on a Convention ground.

[29] The Board is entitled to draw an adverse inference from inconsistencies between an applicant's testimony and their PIF. The applicant provided unclear explanations about his story of expropriation, the pursuit of the PSB and his travel to Canada. The Board made numerous credibility findings based on inconsistencies and implausibility.

[30] The respondent notes that the Board made a "no credible basis" finding. Contrary to the applicant's argument that the Board accepted that the applicant's land was expropriated, the Board did not find this to be credible. However, the Board conducted the alternative assessment in the event that the land had in fact been expropriated.

[31] With respect to the confusing testimony regarding the RIC, the respondent notes that the Board was entitled to draw a negative inference, even if there is another possible explanation for this confused and inconsistent testimony.

[32] With respect to the applicant's inconsistent evidence regarding whether he had difficulty leaving China, the respondent points to the objective evidence, including RIR CHN103133.E, 2 July 2009, which refers to strict exit controls and Project Golden Shield. Project Golden Shield is an integrated computer information system which is used by the PSB and includes all police

related information, including passport information and information regarding entry and exit to and from China. The evidence also confirms that the police are responsible for exit and entry administration.

[33] The respondent submits that the Board's implausibility findings regarding the applicant's ability to get through the Hong Kong airport without incident, if he were wanted and regardless of the assistance of a smuggler, were reasonable. The Board referred to his evidence that the smuggler did not travel with him to San Francisco but took him through the security checks at the Hong Kong airport. Given the RIR that confirms the exit controls, it is not plausible that a non-passenger would be able to do so and, alternatively, it is not plausible that, if the applicant were wanted, he would be able to leave without incident (even if there had been no smuggler).

[34] With respect to the alternative analysis, the respondent submits that the Board's finding that the applicant may be prosecuted but not persecuted is reasonable and dispositive (*Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1454 at paras 7-8, [2012] FCJ No 1552).

[35] In *You v Canada (Minister of Citizenship and Immigration)*, 2013 FC 100 at paras 20-25, [2013] FCJ No 108 [*You*], Justice Phelan found that a protest over compensation does not establish a nexus to a Convention ground. There must be other evidence of opposition to a policy on political grounds. In the present case, as in *You*, the applicant objected only to the compensation being offered.

[36] The respondent submits that the Board reasonably found that the applicant had provided no credible evidence that the PSB or government intended to persecute him. Although he may face harsher consequences than he would for similar conduct in Canada, this is not a basis for a section 97 claim.

The Standard of Review

[37] The parties agree that the standard of reasonableness applies to both issues. The Court must, therefore, determine 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 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker and the Court will not reweigh the evidence.

[38] In *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court of Canada elaborated on the requirements of *Dunsmuir*, noting that reasons are to “be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes” and that courts “may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.”

[39] It is also well-established that boards and tribunals are ideally placed to assess credibility: *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4, 160 NR 315 (FCA). The Board’s credibility findings should be given significant deference: *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No

1329; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65, 415 FTR 82; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7, 228 FTR 43.

[40] As noted by Justice Mary Gleason (as she then was) in *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 42, [2012] FCJ No 369:

First, and perhaps most importantly, the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one because the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility. Also, the efficient administration of justice, which is at the heart of the notion of deference, requires that review of these sorts of issues be the exception as opposed to the general rule. As stated in *Aguebor* at para 4:

There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review [...]

(see also *Singh* at para 3 and *He v Canada (Minister of Employment and Immigration)*, 49 ACWS (3d) 562, [1994] FCJ No 1107 at para 2).

[41] I acknowledge the applicant's submissions that it is not clear where the alternative analysis begins, if it is really an alternative analysis, and that the credibility findings spill over into the alternative analysis.

[42] However, when the decision is read with the record and with a view to support the outcome, as guided by *Newfoundland Nurses*, it is apparent that the Board first considered the credibility of the applicant's story. After concluding that he was not credible, at least to the extent that he was being pursued by the PSB, the Board went on to assess his risk of persecution upon his return to China, assuming that his land had been expropriated and he had protested, and found that his actions were not politically motivated and that although he may be prosecuted, prosecution does not amount to persecution.

The Credibility Findings Are Reasonable

[43] Although the applicant's testimony about whether he brought his RIC with him or had it sent after his arrival was based on a confusing question and the Board may have been overzealous in drawing a negative inference, there were many other credibility findings that justified the Board's overall conclusion that the applicant's story was not credible. These findings are deserving of deference; they are clearly identified and justified.

[44] The Board acknowledged that the applicant's testimony is presumed to be true, unless there are reasons to doubt its truthfulness, and then noted there were such reasons to doubt its truthfulness and clearly set out its credibility findings on a balance of probabilities.

[45] This includes the applicant's confusing, inconsistent and almost incomprehensible testimony about the involvement of one or more smugglers and the role of Ms Jin in Hong Kong. Given the objective evidence in the RIR, the Board drew a reasonable negative inference from

the applicant's testimony that Ms Jin accompanied him through security checks points but did not travel with him from Hong Kong.

[46] The Board reasonably found that it was not credible that the applicant could exit without incident and would not have been required to show his RIC to obtain an exit permit. The applicant's argument, that the Board made a mistake of fact because the referenced RIR does not state that a RIC is required to obtain an exit permit, overlooks that this is simply a mistaken footnote. The Board refers to the correct and authoritative source of its finding, articles 14 and 15 of the Law on Resident Identity Cards (the Law), which confirms that the RIC is required to obtain, among other things, entry and exit (referred to as the "formalities of leaving the country"). The Board refers to the Law in the body of the same paragraph and in the next footnote. The RIR mistakenly referred to in the earlier footnote sets out the process for obtaining a RIC and notes that all persons over 16 must obtain a RIC.

[47] With respect to the Board's finding that an arrest warrant would have been expected if the PSB had visited the family home many times in pursuit of the applicant, the Board did acknowledge the mixed evidence and that the issuance of a warrant is not always implemented. The Board noted that in this case, a warrant would have been expected given the applicant's evidence that the PSB continued to look for him many times, including after he left and up to the Chinese New Year in 2014. The Board's negative credibility finding based on the absence of the arrest warrant is reasonable viewed in the overall context of the applicant's evidence and based on the Board's acknowledgement of the mixed evidence.

[48] It was open to the Board to attribute little weight to the applicant's testimony about his uncle and the jail visiting card, after noting the accessibility of fraudulent documents in China and that this was a photocopy. The transcript of the applicant's testimony about how he obtained the jail visiting card as well as his uncle's RIC, which the Board doubted would be available, supports the low weight attached to the documents – although the weighing of evidence is entirely within the Board's role.

The Alternative Analysis Finding is Reasonable; there is no nexus to a Convention ground

[49] The alternative analysis, based on the assumption that, if the applicant's land had been expropriated and he had protested, his protest was not based on his political opinion and while he could face prosecution, he would not face persecution, is reasonable.

[50] The Board reasonably found that there was no evidence that his protest was political. The applicant stated it was about the inadequate compensation. He did not link it to opposition to the government.

[51] The applicant's testimony was that the purpose of the protest was to see the mayor to negotiate fair compensation and that this was as follow up to the petition sent for the same purpose. The applicant's PIF also referred to the demand for fair compensation as the reason for the petition and the protest.

[52] There is no evidence to support the argument that the applicant's protest is linked to an imputed political opinion.

[53] In *Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 619, [2013] FCJ No 687, Justice O’Keefe allowed the judicial review of a negative decision regarding the applicant’s claim based on a similar circumstances, but found that the credibility findings were not reasonable. Justice O’Keefe also found at para 34:

Finally, I note the Board’s finding that the applicant’s opinion concerning the expropriation of his home was apolitical. I would note, however, that the protest was about more than the value of the applicant’s home. If he is found to be credible, his PIF clearly states that a large crowd of people attended the protest and were shouting slogans such as “The government is unfair”. Such conduct to me sounds to be an anti-government protest.

[54] The present case can be distinguished because the applicant reiterated in detail the words exchanged at the protest, which he indicated lasted a half hour, in both his PIF and hearing and the focus was on the need for farmers to provide food, not accusations that the government was unfair.

[55] In *Jiang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 486, [2015] FCJ No 453 [Jiang], Justice Phelan dismissed the judicial review of the applicant’s negative decision, also based on similar circumstances. Leaving aside the credibility issues, Justice Phelan noted at paras 14-16:

There is no question that the Applicants’ issue with the Chinese authorities was the amount of compensation due upon expropriation. Absent anything else, this could hardly fall within the type of matters covered by the Convention. This finding is consistent with the decision in *You v Canada (Citizenship and Immigration)*, 2013 FC 100:

[20] The real dispute was over money not a grounds under the Convention. The monetary dispute cannot be dressed up as a political dispute just because it is against a government decision.

[21] It was not unreasonable to conclude that there was no nexus to a Convention grounds given the nature of the dispute and protest activities.

As the Board concluded, the fact remains that the Applicants are sought by police for their involvement in interfering with an expropriation. A similar offence exists in Canada under s 129 of the *Criminal Code*.

Therefore, the Board's conclusion as to the absence of a Convention ground must be upheld.

[56] As in *Jiang*, the Board reasonably found that if Mr Cao was being sought, it was due to his involvement in the protest to demand fair compensation and not due to a Convention ground.

[57] The Board referred to the documentary evidence and acknowledged that the penalty for inciting a riot was more severe than that which would be imposed in Canada and that the conditions in many penal institutions in China are harsh and degrading. The Board concluded, however, that this possible consequence would not offend international human rights standards.

[58] I agree that the possible penalty for inciting a riot appears to be disproportionate and acknowledge the applicant's submissions that the documentary evidence suggests that the conditions in China's prisons are not monitored by international bodies. However, I cannot find the Board's conclusion to fall outside the range of reasonable outcomes.

[59] The Board notes that it was not presented with any evidence about what punishment the applicant might face if he were prosecuted upon his return to China. The Board reiterated that the applicant's charge (of inciting a riot) is not related to his political opposition and, on the basis of

the documentary evidence, he would be treated accordingly. The Board's rejection of the section 97 claim is reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and
2. No question is proposed for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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