

Date: 20080602

Docket: IMM-4739-07

Citation: 2008 FC 686

Ottawa, Ontario, June 2, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

and

LU ZHANG

Applicant

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Zhang is a Chinese seaman who arrived in North Vancouver, February 16, 2005, when he jumped ship. On September 4, 2007, the Refugee Protection Division heard his claim for Convention refugee status and on that same day gave very brief oral reasons granting him refugee status.

[2] I am of the view that the Minister's application to set aside the RPD decision must be allowed.

BACKGROUND

[3] Mr. Zhang is 34 years of age and is a Chinese national. In 1993 he began working as a seaman for a Chinese shipping company. He claims to have been paid lower wages and was pressured to sign receipts claiming he was paid more. He also claims to have known about the existence of an international seafarers' organization, to which he could make a complaint regarding his treatment, but he made no complaint for fear that he would be banned from working.

[4] In 2005 Mr. Zhang decided to leave China permanently. He discussed the idea with his family and they supported his decision. He left with US\$ 10,000. His next trip brought him to Vancouver where on February 16, 2005, he jumped ship.

[5] He did not contact authorities in Canada for assistance but remained underground. He met other Chinese people in Vancouver and learned that he could make a refugee claim but he made no such claim until much later and after his apprehension by immigration authorities.

[6] On March 20, 2005, Mr. Zhang called his family in China and his father told him that his family was being forced to pay US\$ 200,000 as a fine or penalty for him jumping ship. His father was interrogated by the Public Security Bureau and a summons was issued by the local PSB against the Respondent on April 18, 2005, in China, directing him to appear for questioning. The Respondent remained underground in Vancouver.

[7] In August 2006, Mr. Zhang found a social insurance card. On September 21, 2006, he was arrested by the greater Vancouver Transportation Authority for not paying a fare for public transit and was subsequently transferred to the Canadian Border Services Agency.

[8] During his interview with the CBSA he alleged that his name was that on the SIN card he had found. Only after being presented with his passport and his seaman's documents did he admit his true identity.

[9] On September 26, 2006, the Respondent made a refugee claim after speaking with the immigration duty counsel who assisted him in the preparation of his personal information form. In February 2007, he was released from custody under conditions and he retained a new lawyer to assist him with the refugee process. His lawyer advised him that he should contact the International Transport Workers Federation (ITF) to launch a complaint about the ship he worked on and to receive some sort of compensation. Mr. Zhang's RPD hearing was initially scheduled for May 9, 2007, but was postponed to September 4, 2007, in order to canvass the possible remedies from the ITF.

[10] On August 14, 2007, the ITF advised the Respondent's counsel that the ship the Respondent had worked on had been sold and any claim for back pay would be difficult. No complaint or further action was taken with the ITF.

DECISION UNDER REVIEW

[11] The RPD decision commences with a discussion of the evidence of Mr. Zhang concerning his reasons for jumping ship. The RPD makes it clear that Mr. Zhang's evidence in this regard has been inconsistent during his interviews and his evidence was not believed.

[12] The RPD then continues with the portion of its decision dealing with the issue of persecution in China. It is so brief it is reproduced in its entirety.

The determinative issue is, regardless of your motives for jumping ship, is what would happen to you if you are forced to turn to China? This case is very close to the wire and I'm going to, however, give you the benefit of the doubt and I'm going to find that you are a Convention refugee. I find that there is a serious possibility you would be persecuted if you were to return to China. You will be persecuted because you have jumped ship and will be punished if you return home.

Since you left the ship, the shipping company Ken Rui and Jan Su Fan Yang both contacted your parents asking about you, telling them they have suffered a penalty of 200,000 U.S. dollars. They wanted your contact information here in Canada. Your father got the first telephone call on March 7th, 2005. They are also threatening your family, seeking repayment of the amount of money. The police or Public Security Bureau went to question your father at his house on April 18th, 2005 and left a summons. You have testified that the neighbourhood community patrol still comes by with questions for your family and they seem to come every one to one and a half months.

To assist the case we can look at similarly situated persons. There is evidence that ship jumpers are harshly dealt with. Counsel has produced an older Response to Information Request from the Immigration and Refugee Board, an update to CHN13414 which outlines some of those punishments. There are also a number of interesting documents which talk about what happens to ship jumpers that complain to the International Transport Workers Federation (ITF).

In your case at this time a claim has not been made to the ITF. What is interesting about those ITF cases is that they do tell how China

responds to embarrassing complaints to international bodies. I find it also indicative of how they will treat ship jumpers which would also be an embarrassment to the country. There is at least a serious possibility that you will be persecuted if you go home.

There are also cases of imprisonment and harsh treatment and there is evidence on the file that some remaining family members have been persecuted, for example, houses and possessions are confiscated. In your case to date this has not happened to date to your family. What is certain is there is no prospect you can ever repay a penalty of 200,000 American dollars.

There is also evidence on your file that the PSB has gotten involved in delving out the punishment. So in your case, state protection and internal flight alternatives are not reasonable, accessible or viable options.

Accordingly, I find you are a Convention refugee and, therefore, accept your claim. [Emphasis added]

ISSUES

[13] The Minister raises three issues:

1. Whether the RPD failed to apply the correct onus and standard of proof;
2. Whether the RPD failed to provide proper reasons; and
3. Whether the RPD made patently unreasonable findings of fact.

[14] The Minister argues that in giving the Respondent the “benefit of the doubt” the RPD applied a different standard of proof than that required at law.

[15] Alternatively, the Minister argues that the reasons are so inadequate that it is unclear what the RPD meant by giving the Respondent the “benefit of the doubt”.

[16] Lastly, it is argued that the RPD made several reviewable findings of fact that were not supported by the evidence before it.

ANALYSIS

[17] In my view, the decision cannot stand. The RPD has failed to provide adequate reasons for the conclusions reached. It may be that the findings of fact complained of are reasonable and it may be that the “benefit of the doubt” assertion does not indicate any misapplication of the burden of proof. However, the reasons are so deficient that one is simply left in doubt on these questions and on others. The following are some of the aspects of the decision where there is no explanation or analysis provided on which the RPD based its conclusion:

- On what basis did the RPD accept the evidence of the Respondent concerning the possibility of persecution in China when it stated that it had not found his evidence on other matters to be credible?
- On what basis did the RPD accept the evidence of the Respondent that a payment of US\$ 200,000 was being demanded of his family when the evidence was that the usual amount claimed was in the range between US\$ 20,000 and US\$ 25,000?
- What weight, if any, did the RPD give to the fact that the Respondent made no mention of the fine or the summons given to his father in any of his statements made to immigration authorities for the period of some 18 months prior to the hearing?
- On what basis did the RPD accept that the evidence of persecution of sailors who complained to the ITF was applicable to the Respondent, since he had made no such complaint?

- On what basis did the RPD accept that evidence of how China responds to embarrassing complaints to international bodies as indicative of how they will treat others who are an embarrassment to the country but have made no such complaint?
- On what basis did the RPD find that ship jumpers are an embarrassment to China?
- On what basis did the RPD find that the summons to the Respondent from the Chinese authorities was with reference to his ship jumping, when nothing on its face indicated that to be so?
- On what basis did the RPD find that the Respondent would be persecuted, rather than prosecuted for jumping ship?
- What analysis was done or consideration given to the Respondent's rank, record of dissident activity and general political climate, all of which are indicated as factors that are considered by China when dealing with ship jumpers?

[18] The necessity for and adequacy of reasons has been discussed in a number of decisions. The following passage of Justice Gibson in *Sandhu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1294 concisely sets out the applicable principles:

21. As earlier noted, the Court is left to speculate with regard to all of the foregoing questions. Speculation is not a proper basis for a decision on an application for judicial review. In *Via Rail Canada Inc. v. National Transportation Agency*, [2002] 2 F.C. 25 (F.C.A.), the Federal Court of Appeal focused on the issue of the duty of an administrative tribunal to give reasons, albeit that in the matter there before the Federal Court of Appeal, the tribunal the decision of which was under review was of a substantially different nature from the Tribunal here. Justice Sexton, for the Court, wrote at paragraphs 16 to 19 of his reasons:

Although the Act itself imposes no duty on the Agency to give reasons, section 39 of the National Transportation Agency General Rules does impose such a duty. In this case, the Agency chose to provide its reasons in writing.

The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focusing the decision maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:

Reasons, it has been argued, force better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.

Reasons also provide the parties with the assurance that their representations have been considered.

In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision-maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

The quotation from the Supreme Court of Canada cited in the foregoing quotation is from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R.817, at page 845.

...

25. In *Mendoza v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 846, 2004 FC 687, my colleague, Justice Dawson wrote at paragraph 4 of her reasons:

Turning to the first asserted error, reasons are required to be sufficiently clear, precise and intelligible so that a claimant may know why his or her claim has failed and be able to decide whether to seek leave for judicial review.

For the quoted proposition, Justice Dawson cited *Mehterian v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (F.C.A.). I am satisfied that the Via Rail decision, which, unlike the *Mehterian* decision, is not in an immigration judicial review context, merely expands on the reasons provided in *Mehterian* as to why reasons are required and as to why reasons must be sufficient.

[19] In this instance, the reasons of the RPD fail to meet any of the requirements discussed by my colleagues and this decision must be set aside.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.
2. The Respondent's application for Convention refugee status is referred back to the Refugee Protection Division for reconsideration and re-determination by a differently constituted Panel.
3. There is no certified question.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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