Date: 20090626

Docket: IMM-4884-08

Citation: 2009 FC 673

Ottawa, Ontario, June 26, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DAVID YOUNG SOP JUNUSMIN
ANGELICA SARI DEWI
PRETTY LADY YOUNG JUNUSMIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] An uncontradicted narrative in evidence is the primary source of understanding the human condition in the context of any judicial analysis. The recognition and acknowledgement of the details of an individual or individuals' background, especially in an immigration or refugee case, are essential. The circumstances, situations and events within a narrative must not be overlooked, otherwise, a travesty to justice could be the consequence. For jurisprudence to be valid, the narrative must be the prime source from which legal analysis begins and ends, or else, it is a theoretical,

abstract exercise divorced from reality. Each individual before the law must be acknowledged for his or her narrative, otherwise, the very integrity of a legal system is in jeopardy.

[2] In this vein, it is necessary to demonstrate a grasp of the country conditions to ensure that the setting is acknowledged; without a setting, a narrative cannot be understood in context.

[3] In the present case, neither the narrative nor the country conditions were adequately, albeit briefly, demonstrated for an understanding of the Applicants' situation.

[4] Moreover, according to the uncontradicted narrative, the Applicants had to pay bribes in order not to be persecuted. If that is not persecution, what is? Despite money being paid, incidents arose demonstrating that no matter how much money was paid, these payments did not guarantee the Applicants' safety. If an individual has to pay for his or her own safety in order to ward off persecution, that, in and of itself, is persecution. The Applicants should not have to pay a bribe in order to survive.

II. JUDICIAL PROCEDURE

[5] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Protection Board ("the Board") dated September 22, 2008 ("the Decision"), which concluded that the Applicants were not Convention refugees within the meaning of section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("the Act") or persons in need of protection under section 97 of the Act.

III. THE IMPUGNED DECISION

[6] In the Decision, the Board member quoted one paragraph from the Applicants' own summary of their claim. The remainder of the Board member's Decision is reproduced below:

> "[8] The panel heard the testimony of the claimants and examined all the evidence.
>
> [9] Accordingly, the panel declared that it was satisfied as to the claimants' identities.
>
> [10] As for the merits of the case:
>
> [11] The claimants stated that they feared for their lives in their country of origin since the 1998 riots.
>
> [12] These riots were not directed as such against the Chinese community or certain religious communities but were an event of a general nature.
>
> [13] Moreover, the claimants left their country in 1998 and did not claim refugee protection. They explained that they did not claim for protection in the Netherlands because they were reputedly told that they did not have to claim refugee protection as soon as they arrived in that country.
>
> [14] Accordingly, they were unable to justify why they did not claim refugee protection as soon as they arrived in Canada.
>
> [15] Moreover, between 1998 and their departure in 2006, there was only one incident with regard to them, in April 2006.
>
> [16] This was an isolated incident and nothing leads the panel to believe that it was an instance of racism or religious persecution against the claimants.
>
> [17] Even if that had been the case, one isolated incident since 1998 would not be sufficient to lead the panel to conclude that the claimants had been subjected to persecution under the terms of sections 96 and 97 of the Act.
>
> [18] Finally, nothing in the documentary evidence leads the panel to conclude that there is religious persecution of the Chinese in Indonesia, under the terms of sections 96 and 97 of the Act.

> [19] To the contrary, the 2004 Country Report contains the following passage:
>
> > "(…) Instances of discrimination and harassment of ethnic Chinese Indonesians declined compared with previous years. (…)
> >
> > [Reproduced verbatim]
>
> [20] Accordingly and in keeping with the above analysis, the panel has no other alternative than to dismiss the refugee protection claims."

[7] A Board member's decision may be brief; however, it must also be accurate to reflect the narrative and the evidence. It is to be noted that Board members may not have time for long decisions; understandably, but decisions, even if brief, must demonstrate that parties have been heard and that their narratives have been analyzed. A Board member's decision that does not show an examination of either a narrative or an analysis according to country conditions is not adequately motivated.

[8] In the following summary of the narrative as reflected in the record, in simply three and a half pages, this Court has, at least, given voice to a narrative that all but disappeared in its most salient points when recounted by the Board member.

IV. BACKGROUND

[9] As no questions were raised by the Board member concerning the credibility of the Applicants, the following facts emerge from this specific case.

[10] The principal applicant, Mr. David Young Sop Junusmin, his spouse, Ms. Angelica Sari Dewi, and their minor child, Pretty Lady Young Junusmin ("the Applicants") are citizens of

Indonesia. Born into a Chinese Buddhist family in 1963, Mr. Junusmin's parents and most of his siblings changed their Chinese sounding names to Indonesian names in 1966 due to the Indonesian government's policy of integration at the time. Mr. Junusmin comes from a family of acupuncturists, and is himself a practicing acupuncturist. He had operated an acupuncture clinic in Jakarta since 1996.

[11] Mr. Junusmin has been a practicing Christian since he became interested in Christianity when he was 17 years old. The existence of duly authentic documents is needed to ensure the veracity of the identity of applicants. In this case, the identity of the Applicants as practicing Chinese Christians was not contested by the Board member. The authentic documents in the certified record of the Board show that Mr. Junusmin and his family are Chinese Christians. They claim to have all suffered persecution and discrimination throughout their lives in Indonesia based on their Christian religion and Chinese ethnicity.

[12] While both Mr. Junusmin and Ms. Dewi claim to have suffered discrimination all through their lives, it was not until 1998 that they claim they began suffering persecution. During the riots that occurred in Indonesia in 1998, Mr. Junusmin was assaulted while on his way to his clinic. His arms and fingers were slashed in a knife attack by a mob, he was knocked unconscious, and robbed. Since it was unsafe for ethnic Chinese to travel in the streets, Mr. Junusmin's brother-in-law had to bribe a policeman to help escort Mr. Junusmin home from the hospital. Mr. Junusmin's clinic was looted and like many Chinese merchants whose businesses had been targeted, Mr. Junusmin and his mother both kept their acupuncture businesses closed for several months as a precaution.

[13] Both Mr. Junumin's clinic and that of his mother had been targeted for extortion of money in exchange for protection even before the 1998 riots; and, after he had re-opened his clinic, he was approached again in 2000 by a second group, wherein he was again insulted regarding his Chinese ethnicity, and continued to be forced to pay protection money, not only to the first group but also to the second group, in order to avoid harassment and being killed.

[14] In 2005, Mr. Junusmin married his current spouse. Like him, she has two children from her previous marriage. Together, they have a daughter, Pretty Lady, who has accompanied them to Canada.

[15] Mr. Junusmin's spouse, Ms. Dewi, also experienced discrimination throughout her life. During the 1998 riots, her female Chinese neighbour was raped. Indeed, during these riots, because of her recognizable Chinese ethnicity, she had to hide in the trunk of a colleague's car to avoid being seen and targeted. She also had to flee her home when a mob threatened to attack the compound where she lived. She stayed away from work for three weeks after these incidents.

[16] After a series of church bombings in December 2000, she did not attend church until February or March 2001.

[17] In 2004, further derogatory comments were made in regard to her Chinese ethnicity when she was robbed at knifepoint.

[18] She applied and received a visa to enter the U.S.A. in 2004; however, Mr. Junusmin's application to the U.S.A. was denied. The couple traveled to Malaysia and Singapore in April 2004 for a period of two weeks because Mr. Junusmin was told by an agent that passports without stamps of visits to other countries would reduce their chances of obtaining a visa. The couple managed to obtain tourist visas to the Netherlands, where they spent a month in late 2004. They had the intention to flee to the Netherlands to claim asylum, but were told at a government office that they could not ask for asylum because they had not done so upon their arrival at the airport. Having no choice, they returned to Indonesia.

[19] In April 2006, the Applicants were, again, assaulted and robbed at knifepoint and were threatened with harm if they made a police report. The Applicants were also made to realize by the police that the latter would only make a report subsequent to the payment of a bribe. The police told Ms. Dewi that due to the Applicants' Chinese origins, they should be mindful of their background; thus, insinuating both a warning and a threat.

[20] The Applicants again applied for a visa to the U.S.A. While Ms. Dewi was granted a visa, Mr. Junusmin was again denied. They were, however, granted tourist visas for Canada. Mr. Junusmin was the first in his family to arrive in Canada. On June 13, 2006, he did not claim refugee protection immediately as he was awaiting his wife and infant daughter, who were to arrive one month later as a result of a sudden illness to which his daughter had succumbed prior to travel. Mr.

Junusmin's spouse and daughter arrived in Canada on July 9, 2006 and the family, as a whole, claimed refugee protection two days later.

V. ISSUES

[21] Three issues are raised by this application:

1. Did the Board member provide sufficient reasons for his conclusions?
2. Did the Board member err in his factual determinations?
3. Did the Board member err in law, under the circumstances which were uncontradicted, when he held that one incident of persecution would not be sufficient to establish persecution under the Act?

VI. APPLICABLE LEGISLATION

[22] Sections 96 and 97 of the Act read as follows:

Convention refugee	**Définition de « réfugié »**
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, (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	**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) 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.
Person in need of protection **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 (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent	**Personne à protéger** **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) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) la menace ou le risque

or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. […]	ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. […]

VII. ANALYSIS

What is the standard of review of decisions of a Board member?

[23] The sufficiency of reasoning of a decision by a Board member is a component of the duty of procedural fairness. As such, the standard of judicial review applicable to whether a Board member has given sufficient reasons for its decision is assessed according to the correctness standard (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 100; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at para. 81; *Vila v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 627 at para. 9; *H.L. v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 521, [2009] F.C.J. No. 645 (QL) (*H.L. v. Canada*) at para. 15). When a breach of the duty of fairness is found, the decision should generally be set aside (*Sketchley*, above, at para. 54).

[24] The second question pertains to possible errors in the Board's factual determinations. Questions of fact regarding the Board's decisions are assessed according to the reasonableness standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53).

[25] Finally, the third question addresses itself to whether the Board erred by holding that one incident of persecution would not be sufficient to establish persecution under the IRPA. Such a finding is a question of law that is reviewable on the correctness standard (see *Sketchley v. Canada (Attorney General)*, above; *Dunsmuir v. New Brunswick*, above, at para. 60).

1. <u>Did the Board member provide sufficient reasons for its conclusions?</u>

<u>Sufficiency of reasons for the finding that the Applicants lacked an objective fear of persecution</u>

[26] The duty of procedural fairness requiring that a Board member comment on documentary evidence in a decision increases with the relevance of that evidence. In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998) 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.) (*Cepeda-Gutierrez*), Justice John Evans found that

> [17] [T]he more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence" […] In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite

> conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[27] In *Maksud v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 221, 137 A.C.W.S. (3d) 390, Justice Carolyn Layden-Stevenson found that when the Board does not disbelieve an applicant, it must at least comment on evidence that was central to the claim:

> [8] It was certainly open to the board to disbelieve the applicant, but it did not. In the face of its finding that Mr. Maksud was targeted for political reasons and in the face of it not having found him to be not credible, in my view, it was incumbent on the board to refer to and comment on this evidence. The RPD could have rejected the evidence, but it could not ignore it because it was central to the claim. If it disbelieved the evidence, it had to say so unequivocally. The ultimate determination, in the circumstances, must be considered to have been arrived at without regard to the evidence and is therefore patently unreasonable.

[28] Indeed, part of the duty to provide adequate reasoning includes addressing relevant contradictory evidence. In *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35, Justice Luc Martineau found that the Board cannot arbitrarily disregard relevant evidence which supports an applicant's arguments.

[29] In *Polgari v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 626, 15 Imm. L.R. (3d) 263, Justice Dolores Hansen found that a finding, open to a decision-maker, does not set aside the necessity of analyzing evidence which is contrary to the Board member's finding on the evidence without written motivation to that effect:

> [32] […] While it may have been reasonably open to the panel to make the findings it did, the absence of any analysis of the extensive documentation contained in the Hungarian Lead Case Information Package and the materials in the RCO disclosure package or the documents submitted by the applicants coupled with the

> failure to adequately address the contradictory documents and explain its preference for the evidence on which it relied warrants the Court's intervention.

[30] This Court has admonished decisions that selectively relied upon certain evidence while ignoring evidence that supports an applicant's position, such as in *Orgona v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 346, 14 Imm. L.R. (3d) 273:

> [31] In assessing whether mistreatment of the Roma, and of the applicants, could be considered persecution, the tribunal found much of the evidence of the applicants lacked credibility in light of certain documentary evidence. But it made no reference to the significant documentary evidence which was supportive of the applicants' claims. In so doing, it appears to have ignored relevant evidence. Even though it is not necessary to refer to all of the documentary evidence before it, when evidence which supports the applicants' position is not referred to, and when other documentary evidence is selectively relied upon, the tribunal, in my opinion, errs in law by ignoring relevant evidence.

[31] With regard to the Board member's finding of the lack of an objective fear of persecution, the Board stated at paragraph 18 of the Decision that "nothing in the documentary evidence leads the panel to conclude that there is religious persecution or persecution of the ethnic Chinese in Indonesia, under the terms of sections 96 and 97 of the Act." The view of the Board member, reproduced below, is in direct contradiction to the evidence in regard to the ethnic Chinese in Indonesia who are systematically robbed and treated violently due to their origins:

> Q: Well we don't see that in the documentary proof that only Chinese people are robbed in Indonesia because first of all you represent three percent of the population and the robbers might not make a lot of money if they do this. What do you have to say about that?
>
> […]
>
> A: Why Chinese are targeted or Chinese origin are targeted by robbery and any atrocity, because it's a common knowledge that Chinese have lots of money.

> Q: You see, we have documentary proof that has been deposited either by your counsel or the Board. And when we read all the documents in question we fail to see that the Chinese ethnic people in Indonesia are systematically persecuted.
>
> [Transcript, at pp. 8-9]

Finally, at paragraph 19 of its decision, the Board member quotes the 2007 U.S. State Department Country Report on Human Rights Practices ("2007 Country Report") that "[i]nstances of discrimination and harassment of ethnic Chinese continued to decline compared with previous years […]."

[32] It is of course, for the Board member to decide the weight to be given to each piece of evidence and to select the evidence that it preferred; however, this must be done according to the whole of the evidence before the Board member, without citing material out of context. Thus, while it was open to the Board member to make the findings which he did, in his Decision, the Board member failed to analyze direct and specific contradictory evidence that goes to the heart of Mr. Junusmin's claim. The documentary evidence before the Board member included the Immigration and Refugee Board's own National Documentation Package on Indonesia (version 2 April 2008) and the documents submitted by the Applicants. Both of these sets of documents, the Board's very own documentation package, in and of itself, had evidence of continuing harassment, systemic discrimination, and violence against Chinese Christians in Indonesia.

[33] In addition to the Board's own documentation package, two affidavits submitted by the Applicants were not mentioned at all in the Board member's Decision, although they offered

evidence of continuing violence against Chinese Christians in Indonesia. One affidavit was submitted by Ms. Janet Hinshaw-Thomas, director of the non-profit refugee organization PRIME – Ecumenical Commitment to Refugees, which is accredited by the Board of Immigration Appeals of the US Department of Justice to represent clients in the U.S. immigration system. In her affidavit, Ms. Hinshaw-Thomas states clearly that in Indonesia, Chinese Christianss must still bargain for their safety to life and limb:

> [12] It is my conviction, based on reviewing a large number of declarations, that despite any well-honed words of certain Indonesian politicians, the average Indonesian Christian and/or Chinese must constantly negotiate safety in Indonesia on a daily basis. The only real protection appears to be the kind which must be bought with money, and there is no concept on the part of the average Indonesian that Indonesia should be a multi-ethnic state with different religions represented […].
>
> [Underlined by the Court]

[34] Contrary to the Board member's perception during the hearing, the affidavit of Ms. Jana Mason of the International Rescue Committee highlights that the ethnic Chinese have been targeted due to their perceived wealth, precisely because they are an identifiable ethnic group, outside of the mainstream of Indonesian society:

> [11] Even ethnic Chinese who are not Christian are presumed to be Christian by much of the Indonesian population and have subjected to violence for that reason. Ethnic Chinese have also been targeted because of their status as an ethnic minority believed by many Indonesians to control the country's wealth. Ethnic Chinese have remained fearful since being targeted for violence in the 1998 riots that preceded the downfall of then-president Suharto. Despite some positive developments since then – including the repeal of certain anti-Chinese laws – the potential for violence against this population has not lessened. Ethnic Chinese are viewed by many Indonesians as perpetual "foreigners." The fact that many or most are Christian gives them yet another "strike" against them.
>
> [Underlined by the Court]

[35] The Board's National Documentation Package on Indonesia (version 2 April 2008) affirms the evidence submitted by the Applicants by clearly demonstrating the cyclical nature of anti-Chinese violence during times of economic crisis wherein ethnic Chinese are targeted because of their perceived economic wealth. In the documentary evidence before the Board member was a document by Human Rights Watch entitled, "Indonesia Alert: Economic Crisis Leads to Scapegoating of Ethnic Chinese", which details the history of how "[a]nti-Chinese violence in one form or another has accompanied virtually every outbreak of social and political unrest during President Soeharto's thirty years in power…" (Certified Board Record, at p. 23, underlined by the Court). The Human Rights Watch document also links anti-Chinese violence to "attacks on churches, adding another explosive element to the mix, as many Chinese are also Christian." (Certified Board Record, at p. 23).

[36] The Board member duly received in evidence, "Patterns of Collective Violence in Indonesia (1990-2003)", published by the United Nations Support Facility for Indonesian Recovery, within which researchers found that the combination of economic success and political marginalization makes the visible Chinese minority in Indonesia vulnerable to explosive violence:

> Anderson (1990) notes that the New Order allowed the Chinese to flourish economically, but it politically marginalized them. We know from the larger comparative literature that such combinations of economic privilege and political marginality make a group extremely vulnerable: their riches are resented, but they have no political, legal or institutional protection when resentments against their riches rise (Chua, 2002). Structural ambivalences of this kind have often been associated with explosive violence in several parts of the world […]
>
> (Patterns of Collective Violence in Indonesia (1990-2003), at p. 29)

[37] Although not binding, but nevertheless significant to this Court, the Applicants did submit as documentary evidence before the Board member, the American decision of *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004) At page 14537 of that decision, the U.S. Court of Appeals for the Ninth Circuit found that periods of relative calm have alternated with periods of anti-Chinese violence:

> We recognize that Indonesia's ethnic Chinese minority is often described as economically powerful, but any reasonable factfinder would be compelled to conclude, in light of the record presented to Judge Hayward and to the BIA, that the economic success of some ethnic Chinese is used as a convenient, recent justification for an anti-Chinese sentiment that has remained constant even as periods of social and political unrest have alternated with periods of relative calm. That sentiment emerges at times of social upheaval, when ethnic Chinese are often made the "scapegoats" for Indonesia's economic and political problems. […]
>
> [Underlined by the Court]

[38] The Board member is presumed to have considered all the evidence without the need to address every piece of evidence. Nevertheless, the Board member has a duty to address in his reasons any evidence directly contradicting conclusions on a key aspect of a determination. Given the applicable law, the Decision before this Court does not provide sufficient reasons. The documents cited above by this Court were all before the Board member and show evidence that specifically and directly contradicted the finding that no objective fear of persecution for Chinese Christians in Indonesia exists. It was open to the Board member to make such findings if that would be the case; however, due to the centrality of the findings to the disposition of the Applicants' claim, it was incumbent upon the Board member to address the abundant contradictory evidence in order to fulfill the duty of giving sufficient or adequate reasons.

[39] Moreover, the Board member's quote from the 2007 Country Report only states that discrimination and harassment of ethnic Chinese Indonesians has "declined compared with previous years." Such reasoning is clearly an insufficient basis for finding that there is no objective fear of persecution. A "declining" amount of harassment says nothing about the actual amount of harassment against the ethnic Chinese in Indonesia. How can harassment be said to have been analyzed in regard to an uncontradicted narrative which is summarily disregarded before a recognition is made of the evidence as a whole? The Board member simply picked and chose evidence without regard to the context whatsoever: The Board member failed to touch upon the essence of the documentary evidence. In making a determination, it is incumbent on the Board member to provide adequate reasons. Thus, the combination of a dearth of analysis and failure to adequately address the evidence in its context warrants this Court's intervention.

<u>Sufficiency of reasons for the finding that the Applicants lacked subjective fear of persecution</u>

[40] While it may be open for a Board member to hold that the failure to claim refugee status in a third country or immediately upon arrival in Canada show a lack of subjective fear, the question is whether the Board member provided sufficient reasoning to support such a finding.

[41] A close reading of the Decision shows that the Board member did not base the finding on the failure to claim refugee status in the Netherlands: it merely summarized the Applicant's position on this point. Rather, the Board member used the Applicants' experience in the Netherlands to infer that the Applicants should have known to claim immediately upon arrival in Canada: "Accordingly,

they were unable to justify why they did not claim refugee protection as soon as they arrived in Canada" (Decision, at para. 14).

[42] The Respondent cites *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 687, 131 A.C.W.S. (3d) 323 for the proposition that for reasons to be sufficient, they must be clear, precise and intelligible so that a claimant may know why his or her claim has failed. Nevertheless, the Board member's reasoning is unclear as to why the Applicants' knowledge of refugee practice in the Netherlands makes their delay in making a claim at the Canadian border on arrival unjustifiable.

[43] Evidence from the hearing as well as from the Applicants' affidavits explain why Mr. Junusmin had delayed claiming protection upon arrival at the Canadian border. As outlined above, he wanted to claim with his wife and daughter, who arrived in Canada nearly a month later due to their daughter's sudden illness. Mr. Junusmin, and his wife and daughter claimed protection two days after the arrival of the latter two. The Board member does not indicate any analysis of the explanation of the principal applicant, Mr. Junusmin.

[44] Indeed, there is no absolute legal requirement that refugee claimants must make their claims at the border at the moment of entry. In *Huerta v. Canada (Minister of Employment and Immigration)*, (1993) 157 N.R. 225, 40 A.C.W.S. (3d) 487 (F.C.A.), the Federal Court of Appeal held that a delay in making a refugee protection claim <u>is not a decisive factor, in and of itself</u>, but

may be a relevant factor for a tribunal to take into account in assessing the statements and actions of a claimant.

2. Did the Board member err in its factual determinations?

Board member's factual determination that the Applicants only experienced one incident of harassment

[45] The Board member's conclusion that between 1998 and 2006 the Applicants only experienced one incident is not supported by the facts. Both affidavits of Mr. Junusmin and his wife detail many incidents of direct and indirect uncontradicted events that together could constituent persecution on the basis of race and/or religion.

[46] For instance, the affidavits reveal that Ms. Dewi was called a racial epithet while robbed at knifepoint in 2004. Ms. Dewi also specified that her female Chinese neighbour had been raped during the 1998 riots, during which time she herself had to hide for her own safety because of her Chinese ethnicity. Mr. Junusmin's affidavit revealed that during the 1998 riots he had been slashed at knifepoint by a mob and his business was looted. Before and after the 1998 riots, in order to protect himself and his acupuncture clinic, Mr. Junusmin, under unrelentless threat, was forced on a continuous basis to pay money to two different groups who extorted funds from him. These incidents, in light of the evidence, demonstrate the anti-Chinese violence of the 1998 riots coupled with the continuing vulnerability of the ethnic Chinese in Indonesia today (See the Response to Information Request IDN101030.E. 28 March 2006, in the information package of the Board itself).

[47] In this case, since the Board member did not find the Applicants lacking in credibility, it was incumbent upon him to consider whether, absent effective state protection, the Applicants would in all-likelihood continue to be targeted for extortion and violent crime (See *Packiam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 649, 130 A.C.W.S. (3d) 1008, at para. 9). The "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (HCR/1P/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979) ("UN Handbook"), as a guide to interpretation of the Convention, sets out criteria and methods by which to analyze facts:

> [201] Very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others, sometimes a small incident may be "the last straw"; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear "well-founded" […].

[48] The Board member did not, at all, consider the evidence before him as to the cumulative effect of harassment in Indonesia, and thereby failed to analyze these incidents as they impacted on the persecution findings (See *H.L. v. Canada*¸ at para. 23).

Whether the 1998 riots targeted the ethnic Chinese minority

[49] Evidence that the 1998 riots targeted ethnic Chinese has been well documented. At paragraph 12 of the Decision, however, the Board member categorically stated that "[the 1998 riots] were not directed as such against the Chinese community or certain religious communities but were

an event of a general nature." The Board member had expressed the same sentiment during the hearing. At page 4 of the Transcript of the hearing, the Board member's line of questioning showed that he believed the 1998 riots were of a general nature of which the opposite is demonstrated subsequent to the Board member's remarks reproduced below:

> Q: You, madam, when did you start thinking that your life was in danger?
>
> A: 13th May 1998.
>
> Q: Okay. But in 1998 the upheaval was not against only Chinese people, it was against the system all together, not only Chinese people were persecuted at that time. Right?

[50] That is not the case, unequivocally, whatsoever, as clearly demonstrated in the evidence. In the evidence before the Board member, many references are made to the 1998 riots as primarily targeting the ethnic Chinese. The *Sael v. Ashcroft* decision, above, is but one such example. Citing the U.S. Department of State Indonesia Country Reports on Human Rights Practices for 1998, among other sources, the *Sael v. Ashcroft* decision at page 14536 directly addresses the result of the 1998 riots: "Anti-Chinese violence peaked recently in 1998, when more than 1,000 people were killed and dozens of women raped during a series of bloody riots" (Underlined by the Court). The *Sael v. Ashcroft* decision also notes that there is evidence that "Chinese shops and homes were the intended targets of this violence, although non-Chinese shoppers and would-be looters became victims when they were trapped inside burning businesses" (*Sael v. Ashcroft*, at page 14536, footnote 6).

[51] Justice Luc Martineau's decision in *H.L. v. Canada*, above, found that it was unreasonable for a Board member in that case to find that the 1998 riots in Indonesia were not directed at ethnic

Chinese. They in fact were: "This assessment flies in the face of the documentary evidence which leaves no doubt that, although the riots were spurred by broader political and economic considerations, their effects were heavily and devastatingly felt by the country's ethnic Chinese population" (*H.L. v. Canada*¸ at para. 24).

[52] There are many references in the Board's own documentary evidence that the 1998 riots were racially motivated. This Court is of the view that the truth of such facts would be known and acknowledged by a Board member. Based on the evidence that was clearly before the Board member, it was unreasonable and without regard to that evidence for the Board member to suggest that the 1998 riots were not targeted against ethnic Chinese in Indonesia.

3. Did the Board member err in law, under the circumstances which were uncontradicted, when he held that one incident of persecution would not be sufficient to establish persecution under the Act?

[53] Given the Board member's error in the factual findings described above, it is clear that the Applicants' narrative contains more than one incident which it was incumbent on the Board member to analyze rather than simply disregard. As such, it not necessary to determine whether, as a matter of law, the Board member erred as to whether one incident is insufficient to find persecution. Nevertheless, it is important to note that the Board member mistook the legal requirement regarding persecution.

[54] The UN Handbook, above, sets out principles that guide the interpretation of that which constitutes persecution:

> [51] There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights--for the same reasons--would also constitute persecution.
>
> [52] Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.
>
> [53] In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

[55] These passages confirm that persecution is determined on a case-by-case basis. One persecutory act may, depending on the circumstances of the act itself, constituent persecution within the meaning of the Act (See *Vural v. Canada (Minister of Employment and Immigration)*, (1994) 80 F.T.R. 313, 48 A.C.W.S. (3d) 830 at para. 5).

VIII. CONCLUSION

[56] The Board member did not provide adequate reasons for his conclusions; he completely disregarded both the subjective and objective evidence. The Board member simply made findings of fact that were unreasonable and without any regard to the evidence before him.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be granted and the Decision of the Board member dated September 22, 2008 be set aside. The matter is to be returned to the Board and referred to a differently constituted panel for reconsideration not inconsistent with these reasons.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4884-08
STYLE OF CAUSE:	DAVID YOUNG SOP JUNUSMIN ANGELICA SARI DEWI PRETTY LADY YOUNG JUNUSMIN and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 3, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Shore J.
DATED:	June 26, 2009

APPEARANCES:

Ms. Jessica Lipes	FOR THE APPLICANTS
Ms. Mireille-Anne Rainville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MS. JESSICA LIPES Barrister & Solicitor Montreal, Quebec	FOR THE APPLICANTS
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT