

Federal Court



Cour fédérale

**Date: 20120530**

**Docket: IMM-6523-11**

**Citation: 2012 FC 665**

**Ottawa, Ontario, May 30, 2012**

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

**BETWEEN:**

**YA NAN HE  
(aka YANAN HE)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board (the Board), rendered on August 30, 2011, wherein the Board determined that Ms. Ya Nan He (Ms. He) is not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the following reasons, this application for judicial review is dismissed.

## **II. Facts**

[3] Prior to her arrival to Canada, Ms. He was a resident of Tianjin in the People's Republic of China.

[4] Her father, with whom she had a close relationship, died on September 7, 2001. She relied on the support of her boyfriend to get through these difficult times.

[5] On September 10, 2005, Ms. He married her boyfriend and on November 1, 2007, she gave birth to their daughter.

[6] In October 2008, Ms. He's husband left her. They subsequently divorced on February 5, 2009.

[7] Depressed by these past events, Ms. He's friend, Jing Wang, introduced her to the Gospel and an underground church.

[8] Ms. He first attended the church on April 19, 2009. After a few months of practice, she felt her outlook had improved.

[9] In December 2009, Ms. He was baptized by Pastor Zhang.

[10] Ms. He alleges that her church was discovered by the Public Security Bureau [PSB] on February 7, 2010. Consequently, she went into hiding at her cousin's house. She learned that the PSB had been to her house on February 11, 2010, and that she was accused of being involved in an illegal underground church.

[11] Ms. He left China on August 25, 2010, because she feared that she would be arrested and detained because of her religious practice. She filed a refugee claim on August 31, 2010.

[12] While in Canada, Ms. He learned that the PSB continued to search for her in China and that the members of her congregation had been sentenced to prison.

[13] The Board found that Ms. He was neither a Convention refugee nor a person in need of protection due to her general lack of credibility. Consequently, Ms. He's application was rejected by the Board.

### III. Legislation

[14] Sections 96 and 97 of the *IRPA* provide as follows:

Convention refugee

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,

Définition de « réfugié »

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du

religion, nationality, membership in a particular social group or political opinion,

fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

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

Personne à protéger

**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

**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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable

(i) elle ne peut ou, de ce

or, because of that risk, unwilling to avail themselves of the protection of that country,

fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

#### **IV. Issues and standard of review**

##### **A. Issues**

1. *Did the Board err in determining that Ms. He was not credible?*
2. *Did the Board breach its duty of procedural fairness?*

## **B. Standard of review**

[15] A credibility finding is a question of fact that is reviewable on a standard of reasonableness (see *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558, [2010] FCJ No 673 at para 11). The Court must determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47 [*Dunsmuir*]).

[16] Questions of procedural fairness are reviewable on the standard of correctness (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 14).

## **V. Parties' submissions**

### **A. Ms. He's submissions**

[17] Ms. He alleges that the Board misconstrued or ignored documentary evidence on religious persecution in China and unreasonably determined that the situation was improving. She also notes that the Board misquoted some of the documentation adduced. More importantly she claims these

documents are significant as they support her position that religious persecution has been escalating over the past few years.

[18] Ms. He further submits that the information available is enough to draw a precise portrait of the situation in China. The China Aid Report clearly shows that the “small amount of information comes from many provinces and municipalities across China and is diverse enough to reflect the overall situation and degree of persecution suffered by house churches in 2010” (see Applicant’s Record at page 275, para 20).

[19] The Board found that there were no references to any incidents in the province of Tianjin. Ms. He disputes that determination as unreasonable and inaccurate since she claims that it is impossible to report all incidents of religious persecution.

[20] The Board also noted that Ms. He “would be able to practice her religion, worshipping in the Christian congregation of her choosing, if she were to return to her home in Tianjin City in China” (see the Board’s decision at para 21). Ms. He argues against this conclusion because the documentation on China is clear that there are restrictions on government controlled churches and that non-registered churches face severe pressure from the government.

[21] According to Ms. He, despite the amount of documentation demonstrating that religious persecution is increasing, the Board chose to rely on irrelevant documents and failed to provide any reasons to support its choice, which constitutes a reviewable error (see *Nasufi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 586 at para 32).

[22] Ms. He also states that the Board cannot make a selective assessment of the evidence adduced. It must address it properly with respect to her situation (see *Bors v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1004 at paras 54, 58, 77 and 78).

[23] Finally, she alleges that the Board breached its duty of procedural fairness by referring to certain documents that were not admitted in evidence and therefore not in the record.

## **B. Respondent's submissions**

[24] The Respondent underlines that the Board determined that Ms. He was not credible. It found that her underground church had not been raided by the PSB and that the members of her congregation were not sentenced to prison. It based its decision on documentary evidence. The evidence demonstrated that no incidents had occurred in Tianjin. The Respondent affirms that the documentation relied on by the Board came from reputable independent sources.

[25] According to the Respondent it was open to, the Board to determine that Ms. He would be able to practice her religion and worship in the congregation of her choice if she returns to Tianjin.

[26] The Board also assessed Ms. He's allegations that the PSB did not leave a summons for her although its agents visited her home on several occasions. Given the documentary evidence on this point, the Respondent claims the Board reasonably concluded that the PSB would not go to such



extent to find Ms. He without leaving a summons ordering her to report to the PSB (see *Zhang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 654 at paras 19-23).

[27] The Respondent submits that the Board's conclusion with respect to Ms. He's departure was reasonable as it relied on objective evidence, namely, the China National Documentation Package. Respondent argues that the Board is entitled to rely on such documentary evidence, in preference to Ms. He's testimony (see *Tekin v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 357; *Aleshkina v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 589). The Respondent further argues that this Court has upheld, in several decisions, that the Board can choose to accept documentary evidence over an Applicant's testimony (see *Yu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 310 [Yu]; *Li v Canada (Minister of Citizenship and Immigration)*, 2010 FC 205 [Li]). According to the Respondent, there were no errors in the Board's consideration of the documentary evidence.

[28] Lastly, even if the Board considered documents that were not part of the Court's record, the Respondent contends that this error does not amount to a breach of procedural fairness since its fundamental finding does not rest on that documentation.

## **VI. Analysis**

### ***1. Did the Board err in determining that Ms. He was not credible?***

[29] The Board did not err in determining that Ms. He was not credible.

[30] A credibility finding is factual in nature. “The jurisprudence is clear in stating that the Board's credibility and plausibility analysis is central to its role as trier of facts and that, accordingly, its findings in this regard should be given significant deference” (see *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052, [2008] FCJ No 1329 at para 13).

[31] In *Yu* cited above, at paras 32-33, Justice Zinn made the following remark:

“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...”

“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.”

[32] In the present case, it was open to the Board to rely on particular documentary evidence. It is the Board's role to assess and weigh the evidence adduced and decide whether it applies to the Applicant's situation. It is clear that the Board considered all the evidence adduced. Even though some documents were contradictory, the Board reasonably determined that there was no evidence to show that religious persecutions had occurred in the Tianjin province. The Board's assessment on that issue cannot be qualified as unreasonable or capricious as it falls within the range of possible

and acceptable outcomes. There was no documentary evidence supporting the proposition of raids to underground churches in Tianjin. Therefore, the Board reasonably concluded that there was not a serious possibility that Ms. He would be persecuted or that she would be subjected personally to a danger of torture or to a risk to her life, or a risk of cruel and unusual treatment or punishment should she return to her country of origin.

[33] Ms. He is asking this Court to reweigh the evidence and substitute its own finding, Ms. He's demand falls "outside the scope of the Court's function on judicial review" (see *Huang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 228, [2011] FCJ No 374 at para 22; *Brar v Canada (Minister of Employment and Immigration)* (FCA), [1986] FCJ No 346 (QL)). It is not the Court's role to reweigh the evidence (see *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] FCJ No 457 at para 11).

## **2. Did the Board breach its duty of procedural fairness?**

[34] Ms. He submits that the "Church and State in China" document was not part of the record before the Board. This, according to Ms. He, raises an issue of procedural fairness.

[35] The Respondent argues that even if the Board considered a document that was not part of the record, this error does not amount to a breach of procedural fairness because it does not change the Board's decision as a whole.

[36] The Court finds that the error committed by the Board does not vitiate its determination. The Board improperly referred to a document that was not part of the China documentation package but its reference to that document was not fundamental to its decision. Therefore, the breach does not warrant allowing this application.

## VII. Question for certification

[37] Ms. He is asking this Court to certify the following question:

*Whether reliance on general country documentation that states that persecution is throughout a country is sufficient or whether locale-specific documentation is still required? And, if so, whether restrictive flow of information must then be taken into account in determining the weight to put on lack of locale-specific documentation.*

[38] A certified question must “transcend the interests of the immediate parties to the litigation and contemplate issues of broad significance or general application... but it must also be determinative of the appeal” (see *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637 at para 4 [*Liyanagamage*]).

[39] The Respondent alleges that the above question is factual in nature and goes to the heart of the Board’s expertise. Furthermore, the Respondent notes that “it is difficult to see how it would be answered in a meaningful way or to see how it could be a serious question of general importance as

the answer is dependent on each case, each document, each country, each applicant and each type of persecution [in the city of Tianjin]” (see Respondent’s letter dated April 19, 2012).

[40] The Court finds that the question proposed by Ms. He fails to transcend the parties’ interest and is not of general importance. It is trite law that a credibility finding goes to the heart of the Board’s expertise as a trier of facts and is different from one case to another. The Board’s approach is not out of step with some of the Court’s decisions (see *Yu and Li* cited above; *Yang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1274; *Jiang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 222). Issues in this regard must be assessed on a case to case basis, bearing in mind the approach of the Supreme Court in *Dunsmuir* cited above.

### **VIII. Conclusion**

[41] This application for judicial review is dismissed. The Board reasonably determined that Ms. He was not credible, as no documentary evidence demonstrated that religious persecution had occurred in the Tianjin. Therefore, Ms. He is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *IRPA*. There is also no question of general importance to certify. The question proposed by Ms. He does not transcend the parties’ interest and is not determinative of the appeal as per *Liyanagamage* cited above.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is dismissed; and
2. There is no question of general importance to certify.

"André F.J. Scott"

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Judge

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

**DOCKET:** IMM-6523-11

**STYLE OF CAUSE:** YA NAN HE  
(aka YANAN HE)  
v  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 16, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SCOTT J.

**DATED:** May 30, 2012

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