Federal Court Cour fédérale

Date: 20090520

Docket: IMM-4865-08

Citation: 2009 FC 521

Ottawa, Ontario, May 20, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

HARDJO LIMARTO and
PIT HA THEN

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board), which determined the applicants were neither Convention refugees nor persons in need of protection. The Board rejected the applicants' claim noting that the discrimination they suffered did not amount to persecution or to torture or to a risk to

their life or a risk of cruel and unusual treatment or punishment within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act).

[2] Hardjo Limarto (the principal applicant) and his spouse, Pit Ha Then (the second applicant) are citizens of Indonesia and of Chinese origin. They claim to have a well-founded fear of persecution on the basis of their race, political opinion and membership in a particular social group. The applicants claim to have been subject to victimization in Indonesia by the Muslim majority since they were children.

[3] The principal applicant suffered a stabbing in 1978 by a group of Muslim men. Although the incident was reported to the police, no action was taken. In 1990, the second applicant was raped by a Muslim man posing as a client in her hair salon. Her salon was frequently targeted for extortion by local Muslim thugs and she was threatened at knife point for refusing on several occasions to accede to demands for the provision of services without payment.

[4] During the riots that swept Indonesia in 1998, the couple lived in fear. During this period, their home was damaged and many other members of the Chinese minority suffered the loss of their homes and businesses to fire.

[5] As a result of the targeting they experienced, the applicants attempted to leave Indonesia as early as 1990. In 2006, they were successful in obtaining visitors' visa to Canada and made a claim for refugee protection on May 23, 2006.

[6] In its decision, dated September 22, 2008, the Board found that the documentary evidence supported the existence of discrimination against the Chinese minority in Indonesia, but concluded that there is no indication that this discrimination amounts to persecution as defined in the Act. In support, the Board cited the following passage of the U.S. Department of State, *Country Report of Human Rights Practice for 2004*, according to which:

> … Ethnic Chinese accounted for approximately 3 percent of the population, by far the largest nonindigenous minority group, and played a major role in the economy. Instances of discrimination and harassment of ethnic Chinese Indonesians declined compared with previous years. On April 14, then President Megawati publicly called on Immigration officials to stop asking ethnic Chinese citizens for a Republic of Indonesia Citizenship Certificate (SBKRI), a document not required of non-Chinese citizens; however, many ethnic Chinese citizens reported they were still frequently asked to show one. An attorney advocate for the rights of ethnic Chinese stated that more than 60 articles of law, regulation, or decree were in effect that discriminated against ethnic Chinese citizens. NGOs such as the Indonesia Anti-Discrimination Movement urged the Government to revoke these articles.

[7] With respect to the applicants' section 97 claim, the Board was not satisfied that, based on their narrative and testimony, they would face a risk of persecution or a risk to life within the meaning of the Act were they to return to Indonesia.

[8] In particular, the Board characterised the acts against the second applicant and her hair salon as "acts of extortion directed against the business community in general and not against the claimants by reason of their ethnic origin *per se*". Moreover, the Board found that the riots of May 1998 were violent acts of a "general nature" not targeted at the ethnic Chinese minority.

[9] The applicants argue that the Board's reasons are inadequate because they include no analysis of the distinction between "mere" discrimination and persecution. This, they claim, leaves the applicants uncertain as to why their experience in Indonesia does not bring them within section 96 of the Act. This, it is asserted, amounts to breach of procedural fairness.

[10] It is also alleged that the Board's reliance on the U.S. Department of State, *Country Report of Human Rights Practice for 2004* was unduly "selective" and is completely without context. The applicants highlight other evidence in the record evincing the cyclical nature of the targeting of the Chinese minority in Indonesia, as well as their continuing status as a socially vulnerable group living in a situation of institutionalized discrimination.

[11] Furthermore, the applicants also contest the Board's finding that the 1998 riots were of a "general nature and not directly [*sic*] solely against the ethnic Chinese minority". This description is, in their view, perverse and capricious in light of evidence in the record describing that same event as one that especially targeted ethnic Chinese, and according to which "an uncertain number of Chinese were murdered, numerous Chinese women were raped, and Chinese homes and businesses were burned". It is also pointed out that the Board makes no reference to the second applicant's allegation of rape at the hands of Muslim man.

[12] The applicants further challenge the Board's characterization of what it describes as a "protection racket" targeting the second applicant's hair salon, given documentary evidence

describing the Indonesian government's frequent failure "to protect shopkeepers, many of them Chinese Indonesians, who experienced extortion by extremists".

[13] Finally, the applicants attack the Board's conclusion that they experienced no personalized discrimination between 1998 and 2006. The applicants point to evidence in the record disclosing that they were victimized on several occasions, as noted above. In any event, they argue that the law does not require a refugee claimant to demonstrate that he or she was directly subject to acts of persecution or attacks on his or her life as a pre-condition to qualifying for protection.

[14] Thus, the applicants raise the following issues:

1. Did the Board provide adequate reasons for its conclusion that the discrimination faced by the applicants did not amount to persecution?

2. Did the Board make capricious and perverse findings of fact in its reliance on selective documentary evidence in support of its decision?

3. Did the Board make capricious and perverse findings of fact in its characterization and weight given to incidents suffered by the applicants as stated in their personal allegations as well as set out in the documentary evidence concerning members of the Chinese minority?

4. Did the Board err in fact and in law in drawing inferences from the absence of specific incidents against the applicants from 1998 to 2006 and the impact of the 1998 riots regarding their motivation for leaving Indonesia?

[15] The applicants urge this Court to find that the Board committed an error in failing to provide sufficient reasons for its conclusion that they faced "mere" discrimination rather than persecution, as members of Indonesia's Chinese minority. Adequacy of reasons is a component of the duty of fairness; this issue will therefore by reviewed on a standard of correctness (*Keqaj v. Canada*

(Minister of Citizenship and Immigration), [2008] F.C.J. No. 495 (QL), 2008 FC 388, at para. 27).

[16] One has the sense from the opening paragraphs of the decision that the Board did not view the facts underlying the applicants' claims as particularly plentiful. The Board writes:

> The male claimant summarized the reasons for his claim for refugee protection in the first paragraph of his narrative as follows:
>
> (…) I am of Chinese origin and I have asked for Canada's protection because of my race and the victimization that I have endured at the hands of the Muslim majority and the victimization that I fear to suffer in the future.

[17] According to the Board, "That is, in essence, the account of the facts that led the claimants to leave their country and to claim protection in Canada".

[18] It is true that the applicants' narratives are not elaborate. They relate their experience of feeling singled out, of struggling against stigmatisation and discrimination in Indonesia from their childhood. No specific incidents are described post-1998, when riots broke out in different parts of the country, although there is reference to recurring incidents of extortion of the second applicant's business.

[19] It is also true that the documentary evidence before the Board was quite extensive. Several reports describe the treatment of ethnic Chinese in Indonesia. For instance, one source indicates:

> On May 12, 1998, six students died at Jakarta in street protests, triggering a wave of looting, burning, raping and other violence directed largely by the urban poor against ethnic Chinese, who had

> long been prominent in Indonesia business and whom many Indonesians blamed for the country's economic plight. Nearly 1,200 deaths occurred May 12-15, with thousands of businesses and building in Jakarta destroyed.
> (*Political Handbook of the World : 2000-2002*."Indonesia." p. 500. A. Banks, T.C. Muller, W.R. Overstreet, eds., Washington, DC: CQ Press.)

[20] Notably, the documentary evidence by and large describes incidents concentrated in the 1990s and in the early 2000s. A Response to Information Request includes this statement:

> In 2001, the Associated Press (AP) reported that "after generations of often violent discrimination, new laws have helped peel away old hatred and many of Indonesia's 7 million ethic Chinese citizens are now quietly optimistic about the future" (28 Aug. 2001). Although, for example, the United States Department of State reported that in 2002 "there were instances of discrimination and harassment" of ethnic Chinese in Indonesia (*Country Reports* 31 Mar. 2003, Sec. 5c), *Freedom in the World 2003* reported that the extent of the violence was "far less than in the late 1990s, when violent attacks killed hundreds and destroyed many Chinese-owned shops and churches" (Freedom House 2003). However, violence against Christians and ethnic Chinese on the central island of Java has been rising since 2000 (*New York Post* 15 Oct. 2002).
>
> (IDN42199.E.9 December 2003. Situation of ethnic Chinese, Christians in Indonesia
> (2001-2003) Research Directorate, Immigration and Refugee Board, Ottawa.
> (*Response to Information Request* (December 9, 2003)

[21] Discrimination in itself does not amount in every case to persecution. It may, however, if it manifests as "sustained or systemic violation of basic human rights demonstrative of a failure of state protection" (Hathaway, James C. *The Law of Refugee Status*. Toronto: Butterworths, 1991, pp.104-105 as cited in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at para. 63). The Board makes no attempt to investigate this distinction. At paragraph 13 of its reasons, the Board writes:

> The panel notes that, according to the documentary evidence, there is discrimination against the Chinese minority in Indonesia, but finds no indication anywhere that his minority is persecuted as defined in the Act.

[22] The UNHCR Handbook provides the following guidance on when discrimination may constitute persecution:

> 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.
>
> 54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.
>
> 55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved. [My emphasis.]

[23] In my view, the Board was not sensitive to the "cumulative effect" of the applicants' past experiences of discrimination in Indonesia (*Canagasuriam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1487 (F.C.T.D.) (QL), 2 Imm. L.R. (3d) 84, at paras. 6-8). There is, for instance, no reference made to the second applicant's allegation of racially-motivated rape. Nor does the Board's decision demonstrate sensitivity to the long history of institutionalized discrimination endured by ethnic Chinese, a context that is amply described in the documentary evidence.

[24] The Board acknowledged the riots of 1998, but found that "these riots and the acts of violence that were committed were of a general nature and not directly [*sic*] solely against the ethnic Chinese minority". 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. One source explains that "the Chinese community was 'blamed unjustly for the collapse of the economy' in 1997, all of which made them 'an easy target' for the violence, which broke out with the currency crisis" (*Response to Information Request* (December 9, 2003)). Indeed, the evidence suggests that "the ethnic Chinese of course are a perennial target any time social unrest breaks out" (*Response to Information Request* (December 9, 2003)).

[25] More recent evidence pointed to by the applicants comes from a Response to Information Request from March 2006 indicating that although the situation of ethnic Chinese in Indonesia is much improved and there were no reports of attacks against them between January 2004 and March

2006, they remain "legally and socially vulnerable" (IDN101030.E. 28 March 2006. Indonesia: Reports of attacks against ethnic Chinese, Christians and non-Christians alike; state protection available (2004-2006)). According to the same report, post-1998 reforms have been "insufficient to deliver freedom from institutionalized discrimination for the ethnic Chinese in Indonesia" who, for instance, continue to have difficulty obtaining identity documents such as birth and marriage certificates. These statements were not referred to by the Board.

[26] I am not, therefore, satisfied that the Board dealt adequately with the central issue of the claim: namely, whether the applicants had a well-founded fear of persecution. Completely absent is any discussion of the cumulative effect of their experiences in Indonesia, whose veracity was not challenged. The Board's consideration of this issue was cursory, at best, and in my view warrants the intervention of this Court.

[27] As to the remaining issues, they relate to the Board's treatment of factual evidence in the record. The deficiencies referred to above in the Board's reasons are similarly reflected in its perfunctory handling of the documentary evidence. The Board failed to take into account the abundant evidence of historical exclusion faced by ethnic Chinese in Indonesia, which provided a critical context for the examination of the incidents described in the applicants' narrative.

[28] For these reasons, I would grant the application for judicial review and remit the matter for re-determination by a differently constituted Board. Both counsel agree that this case does not raise a question of general importance.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application be allowed and that the matter be returned to the Board for redetemination by a different member. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4865-08
STYLE OF CAUSE:	**HARDJO LIMARTO and PIT HA THEN** **v.** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 14, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	May 20, 2009

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