Date: 20041117

Docket: IMM-9408-04

Citation: 2004 FC 1613

BETWEEN:

PEI HUA MU

Applicant

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] Mr. Mu is a failed refugee from the People's Republic of China. The basis of his refugee claim was that he feared persecution in China because of his religious beliefs and membership in a particular social group, the Falun Gong. He was found not to be a Convention refugee and not a person in need of international protection. The grounds were lack of credibility. Although the Refugee Protection Division of the Immigration and Refugee Board noted that terrible things could happen to Falun Gong practitioners in China, it was found he was not a Falun Gong practitioner and therefore faced no possibility of persecution in China.

[2] Since then, Mr. Mu has done two things in Canada. He has practiced Falun Gong with others in a public park in Vancouver, and he has pursued other avenues open to him under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. He sought a pre-removal risk assessment ("PRRA") in accordance with section 112 and following of the Act on the basis that there is new evidence that arose after his refugee claim was rejected. He has also asked that the Minister permit him to stay here on humanitarian and compassionate ("H & C") considerations as per section 25 of the Act.

[3] Both applications were dismissed. He has filed applications for leave and for judicial review of those decisions. In the meantime, he is subject to a removal order. His departure has been tentatively fixed for 24 November. He seeks a stay of the removal order pending the final determination of his two applications for leave and for judicial review.

[4] I have decided to grant a stay pending the outcome of the PRRA application only. There is nothing in the H & C record which lends any credence to any possibility that the Officer made a reviewable error.

[5] However, on the PRRA I find that there are two serious errors which justify a stay. Consequently, it is not necessary for me to consider other grounds which were advanced. The two grounds are the Convention ground of freedom of religion and the standard of proof. In the circumstances, all three components of the test in *Toth* v. *Minister of Employment and Immigration* (1988), 86 N.R. 302 (F.C.A.), have been met: serious issue, irreparable harm and balance of convenience.

Freedom of Religion

[6] Section 113 of the Act relates back to sections 96 to 98. Under section 96, a Convention refugee is one who has a well-founded fear of persecution for any of five enumerated reasons, including religion and membership in a particular social group. For the purposes of this application, but without generally admitting the point, the Minister does not contest that Falun Gong could be considered as a religion.

[7] Irrespective of whether Mr. Mu was a member of the Falun Gong while in China, the PRRA Officer accepted that he is now a member. The issue of conversion for convenience has not come up, at least so far. The Officer said:

I note the applicant's evidence that he practices both at home, and in a public venue (Queen Elizabeth Park). I also note his statement that he undertakes no political activity against China while in Canada, so as not to put his family in China at risk. I find insufficient evidence that the applicant must practice Falun Gong in public spaces. I note that it is a personal choice of his to do so in Canada. While I accept that the applicant is a Falun Gong practitioner who does not wish to give up his practice if he returns to China, I am still not persuaded that the applicant cannot continue to do so, in private, upon return to China.

[8] The Minister relies on Mr. Mu's affidavit in which he says "group practice is what Falun Gong prescribes for its practitioners." He draws a distinction between practicing in public and practicing in a group. A group is defined in *The Oxford English Dictionary* as including an assemblage of persons. What the Officer is saying is that there is nothing to prevent Mr. Mu from practicing in an underground group.

[9] Giving public witness is a fundamental part of many religions. This play on words between "group" and "public" raises the spectre, on the balance of probabilities, that Mr. Mu would be jailed or cruelly punished in China. The documents on file are rife with instances. How can one practice one's religion if one has to be quiet about it? The Minister's reliance on *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] S.C.J. No. 46 (Q.L.) is not well placed. Anselem, and others, were Orthodox Jews who were in divided co-ownership of luxury apartments in Montreal. They set up "succahs" on their balconies to fulfill what they considered their biblically-mandated obligation of dwelling in small, enclosed, temporary huts during the Jewish religious festival of Succot. The condo board sought their removal on the grounds that the succahs violated the building's bylaws. Anselem succeeded on the grounds that freedom of religion included freedom to undertake practices having a nexus with religion in which an individual demonstrates he or she sincerely believes is a function of faith, whether or not it is required by official religious dogma. Those in dissent were of the view that a nexus between the believer's personal beliefs and the precepts of his or her religion must be established. Thus the decision expands the concept of public religious acts, not restricts it.

[10] The record indicates that Mr. Mu practices in public. Although he did use the word "group" in his affidavit, the evidence clearly shows that he did practice in public. He should be judged on what he did, not hung on his choice of words.

Standard of Proof

[11] This issue turns on the meaning of "likely". The Officer found:

I find that the applicant's new evidence is not sufficient for me to find that he would be likely to face either persecution, a risk of torture, a risk to life, or a risk of cruel and unusual treatment and punishment if he is returned to China. I find insufficient evidence that the applicant's whereabouts are being sought by either the authorities or by neighbourhood committee members. I find that the applicant's practice of Falun Gong while in Canada insufficient evidence that he would be targeted upon return to the PRC.

[12] Usually words such as more than a "mere possibility" are used. In *Adjei* v. *Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (F.C.A.), MacGuigan J.A. said:

What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

[13] How does "likely" fit in? In everyday parlance "likely" means more than a fifty percent chance. The Oxford Dictionary defines it as including "probably, in all probability".

[14] The *Competition Act*, R.S.C. 1985, c. C-34, allows for orders forbidding anti-competitive acts if an injury to competition would "likely" occur. This means more likely than not. See *Air Canada* v. *Canada (Commissioner of Competition)*, [2002] 4 F.C. 598 (F.C.A.) at paragraphs 57-58.

[15] These flaws in the Officer's reasoning extend to both whether the underlying issue is serious and the likelihood (I use that word deliberately) of irreparable harm. As to the balance of convenience, although the Minister always has an interest in administering the law, there are indications that practitioners of Falun Gong in China may be unable to get their passports renewed. It would be illusory to have Mr. Mu pursue his Canadian recourses from China. If he were successful, he might never be able to get back here. A copy of these reasons shall also be placed on file in docket IMM-9366-04 which covers the H & C application.

[16] Mr. Mu's presence in Canada for some time and the risk that his romantic aspirations may be dashed if he returns to Canada are not so unusual so as to justify an H & C application (*Melo* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403.

(Sgd.) "Sean Harrington"

Judge

Vancouver, B.C.

November 17, 2004

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE: PEI HUA MU

v.

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