

**Zhu v. Canada (Minister of Citizenship and  
Immigration)  
(T.D.)**

Yong Qin Zhu (applicant)

v.

The Minister of Citizenship and Immigration (respondent)

[2002] 1 F.C. 379

[2001] F.C.J. No. 1408

2001 FCT 1026

Court File No. IMM-5678-00

**Federal Court of Canada - Trial Division  
Dawson J.**

Heard: Vancouver, August 28, 2001.

Judgment: Ottawa, September 18, 2001.

(29 paras.)

*Citizenship and Immigration — Status in Canada — Convention refugees — Judicial review of CRDD decision applicant not refugee — Applicant arriving by boat from China — Claimed well-founded fear of persecution based on membership in particular social group; refugee sur place because informed RCMP about human smugglers, feared "snakeheads" in China would kill him if returned — CRDD holding crux of matter whether applicant's actions identifying, giving information about accused Korean crew members might likely be brought to attention of Chinese authorities, accused themselves, and their reaction — Motion allowed — (1) CRDD entitled to determine applicant not member of particular social group — According to case law persons informing on criminal activity not forming particular social group within meaning of Convention — That information provided involuntarily irrelevant, except as to existence of subjective fear of persecution — (2) Once established applicant's information given to counsel for accused, filed in evidence at public trial, in publicly accessible court records, patently unreasonable for CRDD to suggest further evidence required to establish information actually came to attention of potential agent of persecution — Also, by asking only whether actions would be perceived by Chinese authorities as contrary to their opinion, and by limiting perceived opinion to one challenging state apparatus, CRDD too narrowly construing "political opinion" — Klinko v. Canada (M.C.I.), [2000] 3 F.C. 327 (C.A.) holding political opinion including opinion attracting persecution even where government officially agreeing with opinion — CRDD required to consider whether Government of China "may be engaged" in human trafficking so as to provide required nexus to Convention ground — CRDD not engaging in requisite analysis as not relating*

*public statement China not condoning human smuggling, acknowledging involvement of some local officials, indicating crackdown on those involved, to what it is for state to "be engaged".*

This was an application for judicial review of the decision of the Convention Refugee Determination Division (CRDD) that Mr. Zhu was not a Convention refugee. Mr. Zhu arrived in Canada by boat from the People's Republic of China. He claimed a well-founded fear of persecution based on membership in a particular social group, and that he had become a refugee sur place because he had identified and given information to the RCMP about individuals involved with human smuggling, and for that reason feared that the "snakeheads" in China would kill him if he returned. The CRDD held that the "crux of the matter" was whether the applicant's actions identifying and giving information about accused Korean crew members might be brought to the attention of the Chinese authorities and the accused themselves, and what reaction they may have in that regard. It accepted that the applicant's statements were forwarded to counsel for the accused and were filed in court proceedings which were open to the public. It held, however, that there was no evidence that the information went beyond the court, the Crown and the defence. The CRDD concluded that the claimant's "action [was] not perceived as a political opinion so opposed to the policy or opinion of the Chinese authorities that it [could] be seen to challenge the state apparatus".

The issues were: (1) whether the CRDD erred in the definition of a particular social group; and (2) whether the CRDD erred in its determination of the "crux" of the sur place claim.

**Held**, the application should be allowed.

(1) The CRDD was entitled to determine that Mr. Zhu was not a member of a particular social group. Applying the Supreme Court of Canada's definition of "particular social group" in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, this Court has held that persons informing on criminal activity do not form a particular social group within the meaning of the Convention. It is not a meaningful distinction that an individual was not a willing witness. A [page381] person who involuntarily gives information should not be in a better position than one who voluntarily informs the police about illegal activities. The motive for testifying or advising the police is only relevant to the test of well-founded fear of persecution for a Convention reason to the extent that it impacts on the existence of a subjective fear of persecution.

(2) (i) Although the CRDD did not refer to the information which the applicant had provided about the snakeheads in describing the "crux of the matter", it had previously referred to such information and concluded that he would not become a refugee sur place because he had been subpoenaed to testify against Chinese nationals charged with offences related to human smuggling. While its identification of the crux of the matter could have been more precise, the CRDD properly directed its mind to the full extent of the applicant's actions which were said to found the sur place claim.

(ii) Once the evidence established that the applicant's information was given to counsel for the accused and filed in evidence at a public trial and in publicly accessible court records, it was patently unreasonable for the CRDD to suggest that further evidence was required to establish that the information actually came to the attention of a potential agent of persecution.

(iii) *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327 (C.A.) stated that political opinion could include opinion, expressed or imputed, which attracted persecution even where the opinion was one which the government officially agreed with. By asking only whether the actions would be perceived by Chinese authorities as contrary to their opinion, and by limiting the perceived opinion to one which "challenge[s] the state apparatus", the CRDD gave too narrow a construction to what constitutes a political opinion. The CRDD purported to distinguish *Klinko* on the ground that the information the applicant gave was not given against "Chinese authorities or any of its agents". That distinction was not meaningful. It failed to recognize that in *Klinko* the Court was giving effect to the rejection by the Supreme Court of Canada in *Ward* of a narrow definition of political opinion. The CRDD was required as a matter of law to recognize that political opinion, express or perceived, need not be expressed vis-à-vis the state. Thereafter, it was required to consider whether the Government of China "may be engaged" in human trafficking so as to provide the required nexus to a Convention ground. A broad interpretation is to be given to the requirement that the state machinery be engaged. This flows from the fact that in *Ward* the Supreme Court of Canada found that the state machinery was engaged even though there was no conflict between the views of Mr. Ward and the state. The CRDD did not relate China's public statement [page382] that it does not condone human smuggling, that some local officials may be involved in human smuggling, and that the Government was cracking down on those public authorities who were involved with human smuggling, to what it is for the state to "be engaged". Instead, it considered this evidence only for the purpose of considering that the applicant's actions were consistent with the state's stance with respect to smuggling. The CRDD did not engage in the requisite analysis.

#### Statutes and Regulations Judicially Considered

United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6.

#### Cases Judicially Considered

##### Applied:

*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; (1993), 103 D.L.R. (4th) 1; 153 N.R. 321.

*Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327; (2000), 184 D.L.R. (4th) 14; 251 N.R. 388 (C.A.).

##### Referred to:

Serrano v. Canada (Minister of Citizenship and Immigration) (1999), 166 F.T.R. 227 (F.C.T.D.).

Suarez v. Canada (Minister of Citizenship and Immigration), [1996] F.C.J. No. 1036 (T.D.) (QL).

Mason v. Canada (Secretary of State), [1995] F.C.J. No. 815 (T.D.) (QL).

APPLICATION for judicial review of the CRDD's decision that the applicant was not a Convention refugee (M.I.I. (Re), [2000] C.R.D.D. No. 402 (QL)). Application allowed.

**Appearances:**

Arlene R. Rimer for applicant.

Kimberly G. Shane for respondent.

Solicitors of record:

Rimer & Company, Vancouver, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for order and order rendered in English by

1 **DAWSON J.**:— Mr. Zhu is a 38-year old citizen of the People's Republic of China who brings this application for judicial review from the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD) made on October 11, 2000 [M.I.I. (Re), [2000] C.R.D.D. No. 402 (QL)] wherein it was decided that Mr. Zhu was not a Convention refugee [United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6].

2 Mr. Zhu arrived in Canada by boat on August 12, 1999 from the Fujian province in the People's Republic of China. The basis of his claim to refugee status was described by the CRDD as follows [at paragraph 4]:

The claimant claims that he has a well founded fear of persecution if he returns to China because of his political opinion or perceived political opinion, and his membership in a particular social group. He also claims that he has become a refugee sur place because he identified and gave information to the investigating RCMP officers about those individuals charged with offences related to human smuggling, and for that reason, he fears that the "snakeheads" in China would kill him if he returns. He also claims that he would be severely punished amounting to persecution if he returns to China because he left China illegally.

3 While Mr. Zhu raised numerous issues with respect to the CRDD's decision, the nub of his challenge was with respect to its treatment of his sur place claim.

#### ISSUES

4 Mr. Zhu asserted, in substance, that:

1. the CRDD erred in its definition of a particular social group; and
2. the CRDD erred in its determination of the "crux" of the sur place claim.

#### THE DECISION OF THE CRDD

5 In material part, the decision of the CRDD was as follows [at paragraphs 27-29, 40-46]:

The claimant also claims that he has become a refugee sur place since his arrival in Canada, because he identified and provided information against those who were involved in human smuggling, the snakeheads that brought him and others to Canada. He also claims that his actions were brought to the attention of the snakeheads and the Chinese government because he gave information to the RCMP investigating officers against those Koreans and some Chinese nationals who were charged of offences related to human smuggling. He did not testify in open court at the trial against the Koreans who were charged. He has also received a subpoena to testify against the Chinese nationals who were charged of offences related to human smuggling. The trial relating to the charges against the Chinese nationals is scheduled for November 2000. For these reasons, he fears that if he returns to China he would be severely punished by the Chinese authorities and such punishment amounts to persecution. Further he alleged that he fears that the snakeheads in China would seriously harm him, if not kill him, and the Chinese authorities would not be able to provide him with protection.

The UNHCR Handbook on Procedure and Criteria for Determining Refugee Status states:

A person may become a refugee "sur place" as a result of his o[w]n actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's

country of origin and how they are likely to be viewed by those authorities.

Of particular importance to focus on in determining this issue is whether the action of the claimant might likely be brought to the attention of the authorities in China, and how such actions are likely viewed by the authorities. Are his actions of identifying and providing information to the authorities in investigating and prosecuting those individuals who were suspected of being involved in human smuggling, an expression of his political views, or would they be perceived by the Chinese authorities as a political opinion contrary to theirs?

...

The crux of the matter is whether the actions taken by the claimant, by identifying and giving information about the accused Korean crew members, were brought to the attention of the Chinese authorities and the accused themselves, and what reaction they may have in that regard.

The evidence suggests that the information given by the claimant to the RCMP officers, and his statements, either in videotape or audiotape, were forwarded to the Crown and defence counsel for the accused. They were filed in the court proceedings, which is open to the public and a transcript can be obtained from the court reporters. It also indicates that the court registries can advise as to their policy for making exhibits available for viewing. There is no evidence as to whether any of the information relating to the claimant went beyond the court, the Crown and defence counsel. While defence counsel may reasonably confer with the accused and share with them the information given by the claimant, the claimant never testified against the accused in open court. This lessens the possibility of any adverse reaction against the claimant by the authorities in China or those accused.

It is also my view that testifying in open court as a witness against people who have been charged of offences relating to human smuggling is not an expression of political views, nor would it be perceived as such by the Chinese authorities. The state publicly states that it does not condone or tolerate human s[m]uggling. Documentary evidence indicates that there may be some local official[s] who are involved with human smuggling. However, there is a crackdown by the Chinese government against people involved in human smuggling, including against those who are in public authority. It is seen as a criminal activity rather than a political view.

I am aware of the Federal Court of Appeal decision in the case of Klinko, in which the court answered in the affirmative the following

certified question:

Does the making of a public complaint about widespread corrupt conduct by customs and police to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee in subsection 2(1) of the Immigration Act?

This claimant's claim is different in facts from the Klinko case. The claimant in this case did not complain to the authorities against the conduct of the authorities or any of its agents. The claimant in this case, although he gave information to the RCMP, did not testify against the Chinese authorities or any of its agents or the accused in open court. Even if he did, and although there is the possibility that the Chinese authorities may have known about the claimant, it is my finding that his action is not perceived as a political opinion so opposed to the policy or opinion of the Chinese [page386] authorities that it can be seen as to challenge the state apparatus. Opposition to corruption or criminality is not perceived political opinion unless it can be seen to challenge the state apparatus.

The claimant has not expressed a conviction against human smuggling or trafficking. It is a fact that he patronized it by agreeing to pay as high as US \$36,000 to the smugglers. Here there is no dissent on the part of the claimant against human smuggling. Even if there is, there is no evidence that would make me conclude that he has a political conviction against human smuggling. In Ward, the Supreme Court of Canada states that not just any dissent to any organization will unlock gates of asylum; the disagreement has to be rooted in political conviction.

Acting as a witness in criminality does not necessarily make one perceived as having a political opinion. In the case of Suarez, Jairo v. M.C.I., the court held that there was no political content or motivation when the claimant informed on drug lords. In the case of Marvin, Mejia, Espinoza v. M.C.I., the court found that reporting drug traffickers to the Costa Rican authorities was not an expression of political opinion. Neither do witnesses or informant of criminality belong to a particular social group as submitted in this case by counsel. In the case of Mason, Rawlson v. S.S.C., the court found that a claimant who feared being killed by drug "thugs" because he opposed the drug trade, and informed and testified against his brother in criminal proceeding, was not a member of a particular social group. It states that a "person of high moral fiber who opposed the drug trade" was not a particular social group as this was not a pre-existing group whose members were subsequently persecuted. This

situation is similar to witnesses against those people involved in human smuggling. [Footnotes omitted.]

## ANALYSIS

(i) Did the CRDD err in its definition of a particular social group?

6 For the reasons which follow, I have concluded that the CRDD was entitled to determine that Mr. Zhu was not a member of a particular social group.

7 The Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at page [page387] 739 ascribed the following meaning to the phrase "particular social group":

The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers*, *Cheung* and *Matter of Acosta*, *supra*, provide a good working rule to achieve this result. They identify three possible categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

8 Applying *Ward*, this Court has concluded in the past that persons informing on criminal activity do not form a particular social group within the meaning of the Convention. See, for example: *Serrano v. Canada (Minister of Citizenship and Immigration)* (1999), 166 F.T.R. 227 (F.C.T.D.); *Suarez v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1036 (T.D.) (QL); *Mason v. Canada (Secretary of State)*, [1995] F.C.J. No. 815 (T.D.) (QL).



9 Mr. Zhu sought to distinguish that case law on the basis that he was not a willing witness. It was submitted that he was "duped" by the RCMP into making a statement. I do not find this to be a meaningful distinction.

10 If persons said to be of high moral fibre who voluntarily inform the police about illegal activities are not members of a particular social group, as was the case in Mason, supra, it is anomalous that persons [page388] who accidentally or involuntarily find themselves in fear of reprisals as a result of advice given to the police would, as a matter of law, be in a better position.

11 Status as a Convention refugee is dependent upon the existence of a well-founded fear of persecution for a Convention reason. The only relevance to that test of the motive for testifying or advising the police may be to the extent that a person's motive impacts on the existence of a subjective fear of persecution.

(ii) Did the CRDD err in its determination of the "crux" of the sur place claim?

12 With respect to the sur place claim, the reasons of the CRDD are problematic.

13 First, Mr. Zhu notes that in describing the "crux of the matter" to be whether Mr. Zhu's actions identifying and giving information about Korean crew members were brought to the attention of the Chinese authorities and the accused themselves, the CRDD failed to reference the information which Mr. Zhu provided about the snakeheads.

14 Notwithstanding that omission, in its reasons the CRDD had previously referenced Mr. Zhu's actions identifying and providing information about the snakeheads, and ultimately concluded that he would not become a refugee sur place because, inter alia, he was subpoenaed to testify against Chinese nationals charged with offences related to human smuggling. Thus, while the CRDD's description of the "crux of the matter" could have been more precise, I am satisfied that the CRDD properly directed its mind to the full extent of Mr. Zhu's actions which were said to found the sur place claim. This omission is not by itself a reviewable error.

15 Second, in dealing with the sur place claim the CRDD considered, as being part of the "crux of the [page389] matter", whether Mr. Zhu's actions were "brought to the attention of the Chinese authorities and the accused themselves." The CRDD accepted that the information which Mr. Zhu gave to the RCMP and his statements were forwarded to counsel for the accused, and were filed in court proceedings which were open to the public. However, the CRDD then went on to comment that there was no evidence that the information went beyond the court, the Crown and the defence.

16 Once the evidence established that Mr. Zhu's information was given to counsel for the accused, and filed in evidence at a public trial and in publicly accessible court records, it was, in my view, patently unreasonable for the CRDD to suggest that further evidence was required to establish that the information actually came to the attention of a

potential agent of persecution. That is too high a requirement to be met in order to establish more than a mere possibility of persecution.

17 Third, the final aspect of what was said by the CRDD to be the "crux of the matter" was the CRDD's analysis concerning the reactions of the Chinese authorities and the accused to Mr. Zhu's actions.

18 In this regard, the CRDD posed the question whether Mr. Zhu's action would "be perceived by the Chinese authorities as a political opinion contrary to theirs" and answered the question by stating "it is my finding that his action is not perceived as a political opinion so opposed to the policy or opinion of the Chinese authorities that it can be seen to challenge the state apparatus".

19 In *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327 (C.A.), the Court of Appeal considered what constitutes a political opinion, and confirmed that the term "political opinion" should be given a broad interpretation. The Court of Appeal stated that political opinion could include opinion, expressed or imputed, which attracted persecution even where the opinion was one which the government officially agreed with.

20 Thus, by asking only whether the actions would be perceived by Chinese authorities as contrary to the authorities' opinion and by limiting the perceived opinion to one which "challenge[s] the state apparatus", the CRDD in my view gave too narrow a construction as to what constitutes a political opinion.

21 I have noted that the CRDD did acknowledge the decision of the Court of Appeal in *Klinko*, but purported to distinguish it on the ground that the information Mr. Zhu gave was not given against "Chinese authorities or any of its agents". In my view that is not a meaningful distinction. It is a distinction which fails to recognize that in *Klinko* the Court was giving effect to the rejection by the Supreme Court of Canada in *Ward, supra*, of a narrow definition of political opinion. In *Ward*, the Supreme Court observed that persecution for the expression of a political opinion might originate without state complicity. Thus a "political opinion" included "any opinion on any matter in which the machinery of state, government, and policy may be engaged".

22 What was required, as a matter of law, of the CRDD was recognition that political opinion, express or perceived, need not be expressed vis-à-vis the state. Thereafter, the CRDD was required to consider whether the Government of China or its machinery "may be engaged" in human trafficking so as to provide the required nexus to a Convention ground.

23 A broad interpretation is to be given to the requirement that the state machinery be engaged. This flows from the fact that in *Ward, supra*, the Supreme Court found that the state machinery was engaged in circumstances where there was no conflict between the views of Mr. Ward and the state.

24 In the present case, the CRDD did consider that China publicly states that it does not condone or tolerate human smuggling, that some local officials may be involved with human smuggling, and that the Government was cracking down on those involved in smuggling who were in public authority. However, the CRDD did not relate this consideration to what it is [page391] for the state to "be engaged", but instead seemed only to consider this evidence for the purpose of considering that Mr. Zhu's actions were consistent with the state's political opinion or stance with respect to smuggling. Having regard to the broad interpretation given the requirement in Ward, I am not satisfied that the CRDD engaged in the requisite analysis.

25 The ultimate conclusion reached by the CRDD may have been one open to it on the evidence before it, but for the reasons set out above the conclusion was not supported by the analysis of the CRDD.

26 In the result, the application for judicial review will be allowed and the matter be remitted for determination before a differently constituted panel of the CRDD.

27 Mr. Zhu sought certification of the following questions:

1. If refugee claimants give information to the RCMP with the express proviso that the information be kept confidential and not disseminated and with the express instruction that the refugee claimants did not want or intend to be witness in a criminal proceeding, and through no fault of the refugee claimant, the information they gave is disseminated to the very people they are afraid of and made available to the public and they are subpoenaed as a witness in a criminal proceeding, against their will, whether they actually testify or not, can this group of refugee claimants treated in this way constitute a social group within the definition of a convention refugee and in the context of sur place.
2. If a refugee claimant reluctantly agrees to give the RCMP information about Chinese smugglers and the crew of the smuggling vessel, with the proviso and assurance that the information will be confidential and not disseminated and that he did not want to testify under any circumstances, despite the fact that he fears reprisals and that the smugglers had specifically told him to be quiet, as their interpreter, can the agreement to assist the RCMP amount to a political opinion or action within the meaning of the definition of a convention refugee and in the context of sur place.

28 In my view both questions are very fact specific, and in any event do not give rise to a question of general importance.

ORDER

29 For the reasons set out above, this Court orders that:

1. The application for judicial review is allowed, and the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD) dated October 11, 2000 is set aside. The matter is to be remitted for redetermination before a differently constituted panel of the CRDD.