

Tang v. Canada (Minister of Citizenship and Immigration)

Between
Xiaoming Tang, applicant, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 979
Court No. IMM-3650-99

Federal Court of Canada - Trial Division
Toronto, Ontario
Reed J.

Heard: June 21, 2000.
Judgment: June 21, 2000.
(13 paras.)

Aliens and immigration — Admission, refugees — Appeals or judicial review, scope of review — Grounds — Incomplete transcripts of hearing.

This was an application for judicial review by Tang for an order setting aside a decision of the Convention Refugee Determination Division because the transcript of the hearing was incomplete. Tang argued that inconsistencies in his evidence that the Division had relied upon were explained in the missing transcripts, and that without those transcripts he could not argue that ground of review. The Division had based its decision on other evidence, including Tang's evidence that he had not been actively involved in the political group of which he claimed to be a part.

HELD: Application dismissed. Tang was required to show that the absence of a transcript resulted in a denial of natural justice, because it denied him the ability to present a ground of review that would otherwise have been available, and that the Court was left with an inadequate record upon which to base its decision. Although Tang was likely denied the ability to argue one ground of review, the incompleteness of the transcript did not leave the Court with an inadequate record upon which to base its decision.

Counsel:

Regina Senjule, for the applicant.
Negar Hashemi, for the respondent.

1 **REED J.** (Reasons for Order):— The applicant seeks to have a decision of the Convention Refugee Determination Division set aside because there is an incomplete transcript of the hearing.

2 Both counsel agree that the applicable test is set out in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793. That test is that a decision will be set aside when the absence of a transcript results in a denial of natural justice to the applicant, because it denies him or her the ability to present a ground of review that would otherwise have been available. Madame Justice L'Heureux-Dubé phrased the applicable principles as follows:

[para 82] The question we must therefore answer ... is whether the respondent was denied a ground of review by virtue of the absence of a recording of the hearing before the Council. ...

[para 83] As I have stated, in the absence of a statutory right to a recorded hearing, a party's right to natural justice will only be infringed where the court has an inadequate record upon which to base its decision.
...

3 I have reviewed the transcript in the light of the applicant's affidavit, the CRDD decision and the submissions of counsel. The applicant alleges that the CRDD erred when it did not accept his explanation about why he gave confusing evidence about the ratio of professors to students in the Voice of Democracy group ("VOD"). His explanation was that when the question was first put to him, the word "faculty" was used, and he understood that to include both students and professors. The applicant states that the interpreter explained this confusion on the record.

4 The applicant also contests the CRDD's finding that his evidence was inconsistent because at times he testified that his "signature" was on the petition, while at other times he testified that he was "named" on the petition. The applicant asserts that he never said that he had signed the petition; it had been prepared after he was already in Canada. He states that he explained to the CRDD that his testimony was consistent, and that the confusion had arisen because the word "signature" in the Chinese language could also mean "name". If the transcript was available this explanation would be available to the reviewing Court.

5 I accept the applicant's description of what was said before the CRDD and that its findings with respect to the inconsistent evidence described above are wrong.

6 I also accept counsel's argument that reliance on the applicant's delay in making a refugee claim is misplaced. He based his claim on the presentation of a petition to the Government of China, on March 3, 1998. The applicant's fear of persecution only arose after that date. His claim for refugee status was made the next month. This is not an inordinate delay. His claim is a sur place claim and, therefore, the date as of which he

became aware that he would allegedly face persecution on return to China is the relevant date, not the date on which he arrived in Canada.

7 Counsel for the applicant also argues that other findings by the CRDD cannot be substantiated because there is no transcript of that evidence. One of these is the finding that the applicant provided conflicting evidence about the frequency with which the VOD met. Another is the CRDD's finding that it was implausible that such a group could meet regularly in a student dormitory (a government-run facility) when there was a staff person at the entrance, monitoring the entrance and exit of people, and most of the VOD members did not live in the dormitory. The panel found this to be particularly implausible during the 1989-1990 period "when the authorities were in hot pursuit of pro-democracy and anti-government activists".

8 While applicant's counsel asserts that the transcript is not available to substantiate these findings of the CRDD, the applicant in his affidavit has not said that the CRDD erred in its description of the evidence that was before it with respect to these findings. I cannot conclude that the absence of the transcript creates a prejudice for the applicant, in the absence of an assertion that the CRDD's description of the evidence is wrong.

9 The question, then, becomes whether the three errors identified in paragraphs 3 - 6 above are sufficiently significant to justify setting aside the decision. A significant factor in the CRDD decision was that between 1989 and 1998 the VOD did nothing to promote its cause publicly. For example, it did not write or circulate flyers to popularize its position. The group did little publicly to further its view. It was essentially a discussion group (the CRDD questioned whether it actually existed). The transcript that does exist, supports this finding.

10 The transcript also records that the applicant was asked why he had not alerted his grandfather or uncle to the fact that he had left minutes of the VOD meetings in their home. He was asked why he had not asked them to destroy those minutes. He answered that he had been attending classes, in Canada, and was busy studying and had "not considered every aspect of my problems thoroughly".

11 The CRDD also found it incredible that the applicant could have been instrumental in drafting a petition that was sent to the government of China in 1998, with his name on it, without ever having seen a copy of the petition. This is particularly so when it is alleged that the consequences of sending the petition are so serious for the applicant. The fact that the claimant never asked for a copy of the petition is supported by the evidence in the transcript of the hearing that is available. The transcript also supports the CRDD's finding that the applicant did not engage in significant activities once he was outside China, "to support his alleged passion for political reform in China".

12 I cannot conclude that the incompleteness of the transcript in this case resulted in a lack of adequate information so that the applicant was unable to pursue a ground for review, or was such as to leave the Court with an inadequate record upon which to base its decision.

13 For the reasons given the application for judicial review will be dismissed.

REED J.