Xue v. Canada (Minister of Citizenship and Immigration)

Between
Jian Sei Xue, applicant, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 1728
Docket IMM-4477-99

Federal Court of Canada - Trial Division
Toronto, Ontario
Rothstein J. (ex officio)

Heard: October 16, 2000.
Judgment: October 23, 2000.
(13 paras.)

Aliens and immigration — Admission, refugees — Persecution, protection of country of nationality — Burden of proof — Standard of proof.

Application by Xue for judicial review of a decision of the Refugee Division of the Immigration and Refugee Board rejecting his refugee claim on the grounds that he failed to seek state protection in China which was available to him. The Board accepted that Xue was involved in protests against corrupt officials and could be perceived to be anti-government. However, the Board also found that the Chinese government was making serious efforts to combat official corruption, and that there were as many as 17,000 anti-corruption offices in China. Xue's rationale for failing to approach an anti-corruption office was that he was afraid of reprisals. The Board found that explanation inconsistent with his avowed protest activities which demonstrated a certain fearlessness.

HELD: Application dismissed. There was nothing unreasonable in the Board's reaction to Xue's explanation. It was also open to the Board to rely upon documentary evidence about the Chinese government's efforts to crack down on corruption. Despite some evidence suggesting that the efforts were weak, it was not unreasonable for the Board to have expected that Xue would at least approach an anti-corruption office in his vicinity. The Board applied the correct standard of proof relating to state protection. The assumption that state protection was available could be rebutted only by clear and convincing proof by the applicant. The standard was still a balance of probabilities, but at the more stringent end of the range within that standard.

Counsel:

M. Silcoff, for the applicant.
A.-M. Oberst, for the respondent.

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1 **ROTHSTEIN J.** (ex officio) (Reasons for Order):— In this judicial review of a decision of the Refugee Division of the Immigration and Refugee Board, the issue is state protection. The applicant did not seek state protection in China. The Board found that state protection may have reasonably been forthcoming had the applicant approached an anti-corruption office in China. On this basis, the Board rejected the applicant's refugee claim.

2 The applicant says the Board made three errors:

1. it was inconsistent for the Board to conclude that the applicant should have sought state protection when the police had issued a "wanted" circular for him;
2. the Board failed to weigh the inadequacy of the anti-corruption efforts by the Chinese government;
3. the Board imposed a higher standard of proof than proof on a balance of probabilities.

3 The Board accepted that the applicant's involvement in protests against corrupt officials could be perceived as being anti-government opinion. Despite the frailty of the evidence that a "wanted" circular was issued by corrupt police officials for the applicant, the Board accepted that such circular had issued. However, the Board found that the Chinese government was making serious attempts to stamp out official corruption and that there were perhaps as many as 37,000 anti-corruption offices in China, one being in the applicant's vicinity and that the applicant knew was there. The applicant says he did not wish to approach the anti-corruption office because he was afraid of reprisals. The Board did not find that evidence credible. The Board stated:

> I am not persuaded on a balance of probabilities that, in fact, you were afraid of reprisals and that that fear was the reason that you did not approach one of the anti-corruption offices. The reason for rejecting that particular aspect of your evidence is because according to your narrative, you were not afraid to participate in a protest and to shout slogans about corruption. Given that you were prepared to shout slogans, I do not find it plausible that if you were prepared to do that and risk reprisals for doing that, that you could have been afraid of complaining to an anti-corruption office.

There is nothing inconsistent in the Board's reasoning. It is not unreasonable that the Board would find that the applicant's explanation for not approaching the anti-corruption office was not credible.

4 There was documentary evidence before the Board that the Chinese government's initiatives to crack down on corruption are still inadequate and too weak to stamp out corruption. However, the same document notes that 900,000 suits were filed by common people against government officials in 1997. It refers to 3,700 or 37,000 anti-corruption offices, the different figures coming from different reports. The document was referred to in the Board's reasons but the Board did not make express reference to the weakness of the anti-corruption initiatives. The Board need not refer in detail to every piece of information in the documentary evidence. The fact that there were many anti-corruption offices in China, one of which the applicant knew of in his own vicinity was sufficient for the Board to conclude that the applicant should have at least approached the anti-corruption office. Even though the Board made no reference to the evidence that suggests that anti-corruption efforts are weak, I cannot say it was unreasonable for the Board to have concluded that the applicant should have at least approached the anti-corruption office.

5 I now turn to the issue of standard of proof. The Board explained its approach to the issue of standard of proof in the following words:

> In my view, this claim is to be decided on the state protection issue. According to legal authorities, except in situations where the state is in a state of complete breakdown, states are presumed capable of protecting their citizens. This presumption can be rebutted by clear and convincing evidence of a state's inability to protect. It is this aspect of state protection law that is determinative in this case because, on this point, I must have clear and convincing evidence.

6 To this point, the Board is paraphrasing the test for determining the ability or inability of a state to protect its nationals as set out in Ward v. The Attorney General of Canada, [1993] 2 S.C.R. 689, at 724:

> The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal to actually seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of the state's inability to protect must be provided.

7 However, the Board then continues:

> In other words, to find that the state is unable to protect the claimant, I must be convinced, not just persuaded on a balance of probabilities.

The Board here seems to have been attempting to explain how it would apply the requirement in Ward that the presumption that a nation should be capable of protecting its citizens can be rebutted by an applicant only with clear and convincing proof of the state's inability to protect.

8 The applicant says the Board incorrectly imposed on him a burden of proof higher than proof on a balance of probabilities.

9 Sopinka, Lederman and Bryant in The Law of Evidence in Canada, (2d ed., 1999) paragraphs 5.41 to 5.47 address the civil standard of proof. While at first blush the answer seems uncontroversial, that the civil standard is proof on a balance of probabilities, the issue is not clear-cut, there appearing to be two theories or approaches to the issue. One is that there is no shifting standard or any basis in civil proceedings for departing from the standard of proof on a balance of probabilities. As Laskin C.J.C. stated in Continental Insurance Company v. Dalton Cartage Ltd., [1982] 1 S.C.R. 164, at 171:

> I do not regard such an approach [by Lord Denning in Bater v. Bater, [1952] 2 All E.R. 458, at 459] as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on the balance of probabilities has been established.

Sopinka, Lederman and Bryant quote from the reasons of Dixon J. in Sodeman v. R., [1936] C.L.R. 192, at 216-217 (Aust. H.C.) as well summarizing this approach.

> At common law, as distinguished from ecclesiastical law, no third standard of persuasion appears to have been known. But questions of fact vary greatly in nature and in some cases greater care in scrutinizing the evidence is proper than in others, and a greater clearness of proof may be properly looked for. In the end, however, every issue must be determined by reference to one or the other of these standards [i.e. proof on a balance of probabilities or proof beyond a reasonable doubt].

10 The other theory is expressed by Dickson C.J.C. in R. v. Oakes, [1986] 1 S.C.R. 103, at 137: that proof on a balance of probabilities is a broad category with different degrees of probability within the category.

> Within the broad category of the civil standard [proof by a preponderance of probability], there exist different degrees of probability depending on

the nature of the case: See Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto: 1974), at p. 385. As Lord Denning explained in Bater v. Bater, [1950] 2 All E.R. 458 (C.A.), at p. 459:

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

11 This portion of Dickson C.J.C.'s reasons in Oakes is quoted with approval by the majority in Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at 992. Continental Insurance v. Dalton is mentioned in a brief reference by L'Heureux-Dubé J. in Hickman Motors Limited v. Canada, [1997] 2 S.C.R. 336, at 378. However, the different degrees of probability approach in R. v. Oakes is not disapproved. It would appear that both approaches are open for application.

12 Having regard to the approach expressed by Dickson C.J.C. in Oakes, i.e. that in some circumstances a higher degree of probability is required, and the requirement in Ward that evidence of a state's inability to protect must be clear and convincing, I do not think that it can be said that the Board erred in its appreciation of the standard of proof in this case. If the Board approached the matter by requiring that it be convinced beyond any doubt (absolutely), or even beyond any reasonable doubt (the criminal standard), it would have erred. However, the Board's words must be read in the context of the passage in Ward to which it was referring. Although, of course, the Board does not make reference to Oakes or Bater, and while it would have been more precise for the Board to say that it must be convinced within the preponderance of probability category, it seems clear that what the Board was doing was imposing on the applicant, for purposes of rebutting the presumption of state protection, the burden of a higher degree of probability commensurate with the clear and convincing requirement of Ward. In doing so, I cannot say that the Board erred.

13 The judicial review is dismissed.

ROTHSTEIN J. (ex officio)