

Federal Court



Cour fédérale

Date: 20150218

Docket: IMM-4605-13

Citation: 2015 FC 207

Ottawa, Ontario, February 18, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

HAN LIU

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD), dated May 29, 2013, dismissing the Applicant's refugee protection claim on the ground that she is neither a Convention refugee nor a

person in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The Applicant (or Ms Liu) contends that the RPD committed a reviewable error in its assessment of the documentation supporting her refugee protection claim and breached her right to a fair hearing in failing to identify an issue which eventually formed part of its reasons for decision.

[3] For the reasons that follow, Ms Liu's judicial review application is dismissed.

II. The Facts

[4] Ms Liu is a Chinese citizen. Since 2002, Ms Liu had been studying in Japan, with only short visits to her family in China. In 2008, her mother, who still lives in China, began practicing Falun Gong after suffering a stroke. Falun Gong is a spiritual discipline that is practiced by millions of people in China (and around the world). Ms Liu's mother had to be cautious when practicing Falun Gong as it is illegal in China. During the week, Ms Liu's mother would practice Falun Gong by herself at home but during weekends, she practiced with a group of 11 other individuals at another location.

[5] While in Japan, Ms Liu witnessed many Falun Gong practitioners practicing freely. Upon her mother's request, she gathered some Falun Gong materials and sent them to her mother in China via the internet. Her mother wanted the materials for her Falun Gong group so that they could prepare leaflets for distribution.

[6] On June 14, 2011, Ms Liu arrived in Canada as a tourist. A few weeks later, on July 10, 2011, she received a phone call from her sister telling her that their mother's Falun Gong group had been raided by China's Public Security Bureau (the PSB) and that some members of the group had been arrested although their mother was able to escape. The next day, Ms Liu learned that the PSB had raided her mother's home and found the Falun Gong materials that she had sent to her mother from Japan. On July 12, 2011, a summons was left for Ms Liu's mother's arrest. Ms Liu's sister also told her that the PSB wanted to arrest her, Ms Liu, upon her return to China because of her involvement in the illegal activities, namely that she had sent Falun Gong materials to her mother. This is when Ms Liu made her refugee claim in Canada. She apparently chose Canada over Japan because of the scenery. Since that time, Ms Liu's mother has allegedly been arrested and is in still in detention.

[7] The RPD found the determinative issues for the dismissal of Ms Liu's refugee protection claim to be credibility and lack of reliable corroborative evidence to support her testimony.

[8] When summarizing Ms Liu's testimony, the RPD noted:

- a. That Ms Liu has 23 years of education;
- b. That she was aware that the Falun Gong materials she was sending to her mother was also for the 11 other individuals with whom her mother practiced Falun Gong, although she also testified that her mother did not distribute these materials;

- c. That while she acknowledged that it was inevitable that these materials could end up in the public's hands, Ms Liu admitted not having considered the consequences of her actions which were against the laws of China;
- d. That no corroborating evidence was presented regarding the continuous detention of Ms Liu's mother or that of the five individuals from the Falun Gong group who were arrested at the initial raid by the PSB, including a photocopy of her sister's jail visitor's card that she did not think to provide;
- e. That Ms Liu was unaware of the whereabouts of the other six individuals who, with her mother, escaped arrest;
- f. That when asked how the PSB made the connection between her and the Falun Gong materials found on her mother's computer, Ms Liu's answered that the PSB knew that she was in Japan but that she was unaware of how that would translate into sufficient evidence to implicate her in the matter;
- g. That no summons has been issued against Ms Liu personally, her fear of being arrested upon returning to China resting on what she has been told by her sister; and
- h. That the PSB has not returned to her mother's home since February 2012.

[9] The RPD further noted the summons allegedly issued against her mother did not match the description provided by a "Visiting Scholar" in the documentary evidence which also

indicated that fraudulent documents are readily available in China. This caused the RPD to place less evidentiary weight on the summons and to question the veracity of the arrest warrant.

[10] The RPD did not believe that it had enough evidence before it to agree with Ms Liu that she should fear arrest by the PSB. Nonetheless, it considered an additional analysis based on the assumption that she would be convicted at trial. In this respect, the RPD found that if Ms Liu were to return to China and be convicted at trial, it would be inherent or incidental to the lawful sanctions in China and, as a result, fall outside the scope of section 97 of the Act as per subsection 97(1)(b)(iii). It further noted that, although the laws in China may be harsher than in Canada, and the same standards are not imposed on prison conditions, these were not sufficient grounds upon which to grant a claim under subsection 97(1).

[11] The RPD also found that, on a balance of probabilities, if Ms Liu were to be pursued by authorities in China, it would be because she violated Chinese law and not because she holds a particular belief or that she opposes government policies. Furthermore, it found that the sanctions imposed on Ms Liu would involve fines, threats, and harassment, and fall short of establishing that she would be subjected to cruel and unusual treatment or punishment and risk of torture. The RPD concluded that, should Ms Liu return to China, she would be at risk of prosecution rather than persecution. The RPD further referred to a decision by Justice Eleanor Dawson (as she was then) in *Gong v Canada (Minister of Citizenship and Immigration)*, 2008 FC 600 at para 11, where she noted that evidence did not support that those who sympathise with or associate with Falun Gong practitioners and are subsequently arrested are subjected to cruel and unusual punishment.

[12] Therefore, on the totality of evidence, the RPD determined that Ms Liu had not satisfied her burden of establishing a serious possibility that she would be persecuted or that she would be personally subjected to a risk to her life, or a risk of cruel and unusual treatment or punishment, or a risk of torture, as contemplated by section 96 or subsection 97(1) of the Act.

III. Issues and Standard of Review

[13] This case raises the following two issues:

- a. Did the RPD improperly assess the Applicant's supporting documents, making the decision unreasonable?
- b. Did the RPD breach the Applicant's right to procedural fairness in failing to identify prosecution versus persecution as an issue?

[14] As is well established, credibility and factual findings by the RPD are reviewed on a reasonableness standard (*Dunsmuir v New Brunswick (Board of Management)*, 2008 SCC 9 at paras 47-50; *Alliance Pipelines Ltd v Smith*, 2011 SCC 7 at paras 26-27; *Pena v Canada (Minister of Citizenship and Immigration)*, 2009 FC 455 at para 7) whereas a standard of correctness applies to procedural fairness issues (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 12; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53).

[15] This is not disputed by the parties.

IV. Analysis

A. *Did the RPD improperly assess the Applicant's supporting documents, making the decision unreasonable?*

[16] As indicated above, the RPD rejected the summons adduced into evidence by Ms Liu because the margins did not correspond with the description of a summons provided in the documentary evidence. Ms Liu submits that this finding suffers from a number of defects.

[17] First, she claims that the RPD did not measure the margins in front of her and did not identify the margins of the summons. Given this, she contends that the RPD failed to explain how it arrived at its finding that the summons did not conform to the description provided in the documentary evidence. Additionally, there was no information provided about the unidentified "Visiting Scholar" to qualify him as a reliable source of information. Ms Liu submits that it is an error of law for the RPD to accept the untested information of an unidentified so-called scholar especially when there was documentary evidence to the contrary.

[18] Second, Ms Liu submits that the RPD ignored relevant information contained in the Response to Information Request regarding the variability of PSB practices, making no mention of this information in its reasons for decision. She claims that this information was important to the issue of the authenticity of the arrest summons and notice of arrest and that it should, therefore, be inferred that the RPD made an erroneous finding of fact as contemplated by this Court's judgment in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425.

[19] Third, she argues that the only other reason given by the Panel for rejecting the arrest summons and notice of arrest was based on the Panel's unsubstantiated finding that she would have had the means to secure duplicitous documentation to assist her quest for refugee protection in Canada.

[20] Ms Liu claims that these defects in the RPD's assessment of her supporting documents undermined its assessment of her credibility. She submits that this finding is contrary to the following three basic principles of refugee law:

- a. When a refugee claimant swears to the truth of certain allegations, this creates a presumption of truthfulness, unless there is a valid reason to rebut the truthfulness of the claimant's allegations;
- b. Foreign documents should be presumed authentic and credible; and
- c. The RPD should not be overzealous in assessing a refugee protection claimant's credibility.

[21] This argument, I am afraid, falls short of establishing that the RPD's decision is, as a whole, unreasonable.

[22] First, there was reason to doubt the authenticity of the summons because of the fact that the margins of the arrest summons did not match the description contained in the documentary evidence. This differentiates the present case from that of *Rasheed v Canada (Minister of*

Citizenship and Immigration), 2004 FC 587, at para 19, referred to by Ms Liu in her submissions, where no reason existed to doubt the authenticity of the documents.

[23] The case law cited by the Respondent establishes that the RPD's conclusion that a summons from China is likely fraudulent is not unreasonable when there is some evidence that points to that possibility (*Lin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 183 at paras 20-21; *Jing v Canada (Minister of Citizenship and Immigration)*, 2012 FC 609 at para 17; *Zhuo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 790 at paras 4-6, 9).

[24] Ms Liu referred to the case of *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 157, at paras 53-54, where the Court held that evidence of the availability of fraudulent documents is not enough to declare that documents are fraudulent and the RPD has the duty to determine whether they are genuine or not in the particular circumstance. In the case at bar, this is exactly what the RPD did. The RPD relied on documentary evidence in the Response to Information Request, to find that the margins of the arrest summons did not correspond to the description, which then led to the finding that both the arrest summons and the notice of arrest were not genuine. It is worth noting that the RPD provided Ms Liu's counsel with the opportunity to make written representations on this particular issue. Counsel preferred making oral submissions.

[25] Ms Liu also points to the case of *Veres v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 124 at para 19 and 20, which indicates that the RPD cannot just call any evidence "documentary evidence" and rely on it when there is other evidence available that

points to the contrary. In the present case, however, the situation can be distinguished. The information upon which the RPD relied was contained in a Response to Information Request. This kind of information should be considered reliable as it is available through the Immigration and Refugee Board website, decision-makers are encouraged to use this information, and it is regularly used in the context of immigration and refugee hearings. The information on which the RPD relied in this case was provided by a scholar from the Faculty of Law of the Chinese University of Hong Kong who has extensive research experience regarding Chinese justice and administrative detention.

[26] Second, while it is true that the Court has found that there is variability in the practice of the Chinese PSB (*Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 545 at para 7) and that this factor plays in favour of Ms Liu, this is not enough, considering the other aspects that support a finding of fraudulent documents and more importantly, the other credibility findings made by the RPD, to find the decision of the RPD unreasonable.

[27] Indeed, another important principle of refugee law is that the RPD is best positioned to gauge the credibility of an account and draw the necessary inferences (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4). Significant deference is owed to the RPD as it is within its jurisdiction to weigh the evidence and ascertain credibility (*Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 95 at para 31; *Sinan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 87).

[28] As a result, unchallenged credibility findings must be presumed to be true (*Su v Canada (Minister of Citizenship and Immigration)*, 2013 FC 518 at para 14; *Jiang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1067 at paras 20-22; *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paras 25-26). Therefore, even if I found that the RPD was not entitled to conclude that the summons and the arrest warrant were fraudulent, there were other credibility findings that would be presumed to be true.

[29] Findings that would be presumed to be true include:

- a. Ms Liu testified that she had not wanted her mother to distribute the Falun Gong materials, but in her Personal Information Form, she stated that she agreed to send the materials to help prepare leaflets to be distributed;
- b. Ms Liu testified that the PSB made the connection to her because they were aware she was in Japan, but the RPD did not consider her testimony proof that she had in fact been implicated;
- c. No evidence was adduced to show that the five members who were arrested were still in detention;
- d. There was no evidence proving that Ms Liu's mother was still in detention today;
- e. Ms Liu testified that she did not think of providing a copy of her sister's jail visitor card as corroborative evidence of her mother's detention; and

- f. The Chinese authorities have not returned to the family home since February 2012.

[30] Given these credibility concerns, the RPD was entitled, in my view, to give little probative value to Ms Liu's corroborative evidence and it was reasonably open to it, based on these concerns, to conclude that Ms Liu did not meet the definition of a Convention refugee or of a person in need of protection pursuant to sections 96 and 97 of the Act. In such context therefore, the RPD did not err in failing to explain why it gave no weight to documents purporting to substantiate allegations found not to be credible (*Huang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 288 at paras 21-22; *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 471 at para 26).

[31] Negative credibility findings are determinative and the failure to prove that they are unreasonable is sufficient to defeat a refugee protection claim (*Aguebor*, above at para 4). As a result, Ms Liu's argument that the RPD improperly assessed the supporting documents, making its decision unreasonable, must fail.

B. *Did the RPD breach the Applicant's right to procedural fairness in failing to identify prosecution versus persecution as an issue?*

[32] The Respondent does not challenge the fact that the issue of whether Ms Liu would be prosecuted or persecuted if returned to China was not raised either in the RPD Screening Form before the hearing, or during the hearing. However, the Respondent argues that this issue is not determinative of Ms Liu's refugee protection claim.

[33] I agree. Had this issue been determinative of Ms Liu's claim, the failure on the part of the RPD to raise it before or during the hearing in order to provide Ms Liu with an opportunity to respond to it would have been a clear breach of Ms Liu's right to a fair hearing and sufficient ground to quash the RPD's decision. But it was not.

[34] As indicated previously, the determinative issues in this case were credibility and corroborative evidence. In other words, Ms Liu was found by the RPD not to be credible. The RPD was therefore not required to embark on a discussion as to whether Ms Liu had more chance of being prosecuted than persecuted if returned to China as it had already found that she had not credibly established that she was at risk upon returning to that country.

[35] For these reasons, I find that the RPD's miscue in this regard does not warrant intervention from the Court.

[36] Ms Liu's second ground of argument against the RPD's decision must also fail.

[37] Neither party has proposed a question of general importance. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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