Federal Court Cour fédérale

Date: 20170601

Docket: IMM-4701-16

Citation: 2017 FC 539

Ottawa, Ontario, June 1, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

XIUHUA CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Xiuhua Chen, a citizen of China, claims that she fled her homeland to avoid persecution for practising Falun Gong. She seeks judicial review of a decision dated October 19, 2016 by the Refugee Appeal Division of the Immigration and Refugee Board (RAD), wherein the RAD dismissed her appeal and confirmed the decision of the Refugee Protection Division (RPD) that she is not a Convention refugee or person in need of protection.

[2] For the reasons below, this application is dismissed.

II. BACKGROUND

[3] Ms. Chen is 35 years of age and from Fujian Province. She says that she began practising Falun Gong in February 2015 because she was suffering from back pain, headaches, and general weaknesses following medical procedures in October 2013.

[4] On August 29, 2015, an acquaintance of the applicant's husband was arrested by the Public Security Bureau (PSB) for illegal Falun Gong activity. The applicant obtained a passport at her husband's request but says that she was unwilling to stop practising or leave China at that point. Nonetheless, the applicant says that her husband hired a smuggler as a precaution.

[5] On November 12, 2015, a fellow practitioner was arrested by the PSB while handing out Falun Gong pamphlets; as a result, the applicant went into hiding. While in hiding, she learned that the PSB had visited her home and left a summons on November 14, 2015.

[6] On December 6, 2015, the applicant left China through the assistance of a smuggler and arrived in Toronto on the same day. She made her refugee claim on February 19, 2016.

III. DECISION UNDER REVIEW

A. *The RPD Decision*

[7] The determinative issues before the RPD were the applicant's credibility and profile as a Falun Gong practitioner. The RPD found inconsistencies between the applicant's testimony at

the hearing and her allegations in the Basis of Claim document. The Panel did not accept that the applicant was a wanted person as she had left China on her own documents and would have been identified by the PSB through the screening system at the airport. The PSB summons was given little weight as such documents are easily falsified. The applicant's identification as a Falun Gong practitioner in China was questioned as was her *sur place* claim based on practise in Canada.

B. *The RAD decision*

[8] Under subsection 110(4) of the IRPA, the RAD admitted new evidence submitted by the applicant; a Jail Visiting Card said to have been provided to the spouse of the arrested fellow practitioner. The RAD concluded that an oral hearing would not be held because the new evidence alone would not justify allowing the refugee protection claim under subsection 110(6) of the IRPA.

[9] The RAD noted credibility concerns relating to (1) the applicant's ability to exit China undetected using her own genuine passport, (2) the summons, and (3) the applicant's identity as a genuine Falun Gong practitioner. The RAD reviewed the audio recording of the RPD hearing and conducted an independent assessment of the entire record.

[10] In considering the issue of the applicant's exit from China, the RAD considered (1) the documentary evidence of the PSB's access to the Golden Shield database, (2) the use of this database to track Falun Gong practitioners, (3) Chinese law requiring citizens to present their

passports upon exit, and (4) the multiple checkpoints that must be passed when exiting the country where passports are checked.

[11] The RAD considered that the applicant did not satisfactorily explain how she could exit China without being detected. In the Panel's view, the applicant's evidence regarding the smuggler was vague and lacking in detail. She was unable to provide any details of what the smuggler did for her other than facilitate her journey to Canada, and complete her visa application.

[12] The RAD further noted that the applicant alleged that the PSB visited her home on at least three occasions prior to her departure and after her departure from China. The Panel found that this allegation undermined the suggestion that her name was somehow removed from the national computer system through bribery of an official with access to the system. In light of this indication that the PSB continued to show interest in pursuing her, as well as the arrest of the two co-practitioners, the RAD considered that it is reasonable to expect that the local authorities would have entered her information into the database to further their efforts to apprehend her.

[13] The RAD found it highly improbable that the smuggler would have the prior knowledge of whom to bribe to facilitate safe travel through each checkpoint. To that end, the RAD noted Article 51 of the *Exit and Entry Administration Law of the People's Republic of China*, which provides that companies involved in the transportation of goods and passengers in and out of Chinese ports must declare information on the goods and passengers in advance of their

departure. The RAD was convinced by the objective documentary evidence that border authorities are provided detailed information on the passengers aboard outbound flights.

[14] Ultimately, the RAD placed more weight on the objective documentary evidence regarding the Golden Shield and other border controls in place in China. As such, the RAD found that given the evidence provided by the applicant, it was highly unlikely that she could have bypassed all of the security controls in place even with the assistance of the smuggler.

[15] Regarding the applicant's claim of practising Falun Gong, the RAD acknowledged the very low threshold to demonstrate religious knowledge as a requirement for providing religious identity. Nonetheless, given the length of time the applicant claimed to have practised Falun Gong, the RAD was troubled by the applicant's limited understanding of the faith. As such, the RAD agreed with the RPD that the applicant is not a genuine Falun Gong practitioner.

[16] The RAD also concluded that the applicant was not actually wanted by the PSB, on a balance of probabilities, given the lack of a coercive summons, the arrest of co-practitioners and no action by the PSB against the applicant's family. In light of the number of alleged visits by the PSB (possibly on four or five occasions), and the applicant's failure to comply with the initial summons, it is reasonable to assume from the documentary evidence that an arrest warrant or coercive summons would be issued for failing to appear for interrogation.

[17] The RAD noted that its review of the audio recording disclosed insufficient credible evidence upon which it could find that the Chinese authorities would be aware of the applicant's

alleged activities in Canada. Therefore, the RAD confirmed the RPD's decision under paragraph 111(1)(a) of the IRPA, and dismissed the appeal.

IV. ISSUES

[18] The parties did not make any submissions on the standard of review. The appropriate standard of review to be applied by this Court to the RAD's decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] FCJ No 313 at paras 30 and 35 [*Huruglica*].

[19] The standard of reasonableness applies to the RAD's credibility findings and its assessment of the evidence. The RAD's determination of the *sur place* claim is also reviewable on a reasonableness standard: *Siliya v Canada (Minister of Citizenship and Immigration)*, 2015 FC 120, [2015] FCJ No 35 at para 20, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53 [*Dunsmuir*]; see also *Zhang v Canada (Minister of Citizenship and Immigration)*, 2016 FC 765, [2016] FCJ No 725 at para 26 [*Zhang*].

[20] This application raises the following issues:

A. Did the RAD fail to assess the applicant's new evidence?

B. Were the RAD's credibility findings reasonable?

C. Did the RAD err in rejecting the *sur place* claim?

V. ANALYSIS

A. *Did the RAD fail to assess the applicant's new evidence?*

[21] As noted above, the RAD admitted the new evidence about the jail visiting card issued to the spouse of the alleged co-practitioner and found that it did not justify allowing the appeal. Beyond that, the RAD said nothing about the significance of the evidence. The applicant submits that this is fatal to the decision as the evidence substantiated her allegations and contradicted the RPD's rejection of her claim for lacking credibility. The applicant argues that there are insufficient "dots on the page" for this Court to connect, thereby making the decision unintelligible: *Komolafe v Canada (Minister of Citizenship and Immigration),* 2013 FC 431, [2013] FCJ No 449 at para 11.

[22] The respondent submits that the RAD did consider the new evidence but found that since it alone would not justify allowing the refugee protection claim, it added nothing to the applicant's claim.I agree with the applicant that the RAD's treatment of the new evidence was not thorough. However, I do not accept the applicant's position that the RAD entirely failed to address that evidence.

[23] The Supreme Court has stated that reviewing courts must pay respectful attention to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome: "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 at para 14 [*Newfoundland Nurses*]. This is not "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own

rationale for the result": *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at para 54.

[24] This is not a case in which the reviewing court is unable to discern the tribunal's reasoning. The determinative issue in this case was credibility. The new evidence did not help the applicant overcome the objective evidence on the record and the tribunal's other credibility concerns. The RAD's treatment of the new evidence could have been more exacting, but it did not fail to assign weight to the evidence. The RAD refused to conduct an oral hearing because it found that the new evidence would not justify allowing the refugee claim. Based on that assessment, it is clear that the RAD did not assess much weight to the new evidence.

B. *Were the RAD's credibility findings reasonable?*

[25] At the core of the applicant's claim is that she fears returning to China because she is wanted by the Chinese authorities for being a Falun Gong practitioner. In refugee matters, the assessment of credibility is at the heart of an administrative tribunal's expertise, and it is specific to the facts of each case: *Florez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 659, [2016] FCJ No 636 at para 19. The RAD's reasons indicate that it considered the applicant's evidence and arguments, as well as the objective documentary evidence in the record. In my view, the RAD's assessment of the evidence was transparent, intelligible and justified.

[26] I agree with the applicant that the RAD appears to have erred in citing the wrong statute, the *Criminal Procedure Law of the People's Republic of China*, at footnote 29 of its Reasons, in considering whether the issuance of a coercive summons would be required in all cases in which

the PSB was investigating unauthorized religious practice. But this error is not, in my view, fatal to the RAD's analysis.

[27] The little weight attributed by the RAD to the summons has to be reviewed in the context of the totality of the evidence before it. The RAD's concern regarding the authenticity of the summons was driven by the applicant's testimony that her home was visited a number of times but that no action was taken by the PSB to enforce the summons. The RAD was careful to note that its conclusion on this issue was not reached in isolation, as it also considered the other credibility concerns mentioned, such as the ability to exit China without being apprehended and the applicant's limited knowledge of Falun Gong.

[28] In her submissions to the RAD, the applicant had relied on several decisions from this Court to argue that the RPD had erred when it found that, even with the use of a smuggler, it was implausible that the applicant could exit China using her own genuine passport. These decisions included *Sun v Canada (Minister of Citizenship and Immigration)*, 2015 FC 387, [2015] FCJ No 347 [*Sun*] and *Ren v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1402, [2015] FCJ No 1493 [*Ren*]. The RAD found these cases to be distinguishable from the facts of this case.

[29] I note that in both *Sun* and *Ren* the applicants had testified that the smuggler bribed the appropriate person. In *Ren*, for example, at paragraph 16, the applicant explained that he retained a smuggler who told him to go to a particular exit, which is how he was able to leave on his own passport. In *Sun*, the applicant testified that the smuggler had bribed the customs agents. There

is no such evidence in the present matter. The applicant did not provide any explanation as to how the smuggler had managed to arrange her departure from China without incident.

[30] On this application, the applicant submits that the recent decision of this Court in *Yao v Canada (Minister of Citizenship and Immigration)*, 2016 FC 927, [2016] FCJ No 891, is also not distinguishable. I disagree. In *Yao*, at paragraph 8, the applicant testified that he had obtained a fraudulent passport from the smuggler so that he could leave China without being apprehended by the police. The RPD in that case found that the applicant's ability to pass through the airport without incident supported the finding that his passport was genuine, and not fraudulent. That conclusion was found to be unreasonable. A similar credibility finding was not made in this case.

[31] In *Yang v Canada (Minister of Citizenship and Immigration)*, 2016 FC 543, [2016] FCJ No 511, another case cited by the RAD, the RPD had erroneously found that it was implausible that the smuggler would be able to pay off multiple immigration officials, PSB officers, customs officials and airline representatives. In the present matter, however, the RAD explicitly noted that the RPD did not engage in the speculation that hundreds of officials would have to be bribed. Instead, the RAD outlined the objective documentary evidence which demonstrated the sophistication and effectiveness of the Golden Shield Project and other border exit control mechanisms.

[32] The RAD did acknowledge that it might be possible for a smuggler to bypass some of the security controls, but found that there was no evidence in this case to suggest that the applicant could have bypassed all of the security controls in place.

[33] The RAD's finding that the applicant's knowledge of Falun Gong did not support her claim to be a practitioner was made with the explicit recognition that this Court has said that the threshold is low. I see no reason to interfere with the Panel's determination of this question.

C. *Did the RAD err in rejecting the sur place claim?*

[34] The applicant did not press this issue at the hearing but relied on her written submissions. In those submissions, she contends that the RAD's findings about her *sur place* claim were tainted by its previous analysis and that the Chinese authorities would be able to identify her as a practitioner because of her activities in Canada.

[35] In my view, it was not unreasonable for the RAD to rely on its credibility findings regarding the authenticity of the applicant's overall claim in its assessment of the *sur place* claim: *Zhou v Canada (Minister of Citizenship and Immigration)*, 2015 FC 5, [2015 FCJ No 2 at para 23. The applicant did not present any concrete evidence to demonstrate that the Chinese authorities would be aware of her alleged activities here in Canada. As such, it was not unreasonable for the RAD to conclude that the applicant's general evidence – a supporting letter and some photographs – was insufficient to support a finding that she is a genuine Falun Gong practitioner.

VI. CONCLUSION

[36] I am satisfied that this application for judicial review should be dismissed as the RAD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[37] No serious questions of general importance were proposed for certification.

JUDGMENT in IMM-4701-16

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4701-16
STYLE OF CAUSE:	XIUHUA CHEN V THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 10, 2017
JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	JUNE 1, 2017

APPEARANCES:

Michael Korman	FOR THE APPLICANT
Khatidja Maloo-Alam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Korman Barrister & Solicitors Otis and Korman Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT