

Federal Court



Cour fédérale

**Date: 20170602**

**Docket: IMM-4239-16**

**Citation: 2017 FC 543**

**Ottawa, Ontario, June 2, 2017**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**QUIYING GU  
FENG GAO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision dated September 14, 2016 by the Refugee Appeal Division of the Immigration and Refugee Board (RAD), wherein the RAD dismissed the applicants' appeal and confirmed the decision of the Refugee Protection Division

(RPD) that the applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the IRPA.

## II. BACKGROUND

[2] The applicants, Ms. Qiuying Gu and Mr. Feng Gao, are citizens of China. The married couple claim that they fear persecution because of Ms. Gu's adherence to Falun Gong. Ms. Gu alleges that she is wanted by the Chinese Public Security Bureau (PSB) for practicing Falun Gong. The applicants claim that they were forced to go into hiding in November 2015 after learning of the arrest of a co-practitioner for placing Falun Gong leaflets in residential mail boxes.

[3] The applicants left China and arrived in Canada on December 15, 2015 with the assistance of a smuggler. Since coming to Canada, the applicants say, they have learned that the police in China continue to seek them out.

[4] The applicants' claim was heard by the RPD on April 22, 2016; their claim was denied on May 24, 2016. They were unsuccessful on appeal as the RPD's decision was upheld by the RAD on September 24, 2016.

## III. DECISION UNDER REVIEW

### A. *The RPD decision*

[5] The determinative issues before the RPD were the applicants' credibility and Ms Gu's profile as a Falun Gong practitioner.

[6] The RPD concluded the following: (1) Ms. Gu was not a genuine Falun Gong practitioner in China; (2) the applicants were not being pursued by the PSB in China; (3) the applicants are not genuine Falun Gong practitioners in Canada; and (4) they will neither practice nor will they be perceived to practice Falun Gong upon returning to China.

[7] To assess the credibility of the applicants and their claims, the RPD focused on the following areas: (1) the reasons given for why Ms. Gu went into hiding; (2) the applicants' residences before they left China; (3) the genuineness of a summons said to have been issued by the PSB; (4) the applicants' ability to exit China and travel to Canada; and (5) Ms. Gu's medical condition in relation to her beginning to practice Falun Gong.

[8] The RPD did not find the applicants to be credible witnesses as it noted several material inconsistencies, contradictions, and omissions in their evidence. Ms. Gu's testimony with respect to the arrest of her fellow practitioner was found to be inconsistent, shifting and evolving. She was unable to explain inconsistencies between her testimony and Basis of Claim (BOC) document.

[9] The absence of objective evidence that the arrest of the co-practitioner had occurred was considered by the RPD to be significant and undermined the applicants' credibility.

Inconsistencies in the applicants' evidence regarding the issue of whether they were *in hiding* or *at home* prior to leaving China was also considered to be material.

[10] A summons presented by the applicants was considered to be not genuine for the reasons that (1) it instructed Ms. Gu to report to the PSB in a province other than her own, and (2) Ms. Gu was not served with a coercive summons or an arrest warrant upon failing to appear. There was also no evidence that Mr. Gao had been issued a summons for failing to disclose his wife's location.

[11] The RPD further found that the applicants were likely not individuals of interest to the PSB because they flew from Shenyang to Beijing and on to Canada using their genuine passports. The RPD found it implausible that a smuggler would have been able to bribe their way through airport security without being caught by the Golden Shield system.

[12] The RPD gave little weight to Ms. Gu's testimony that she began to practice Falun Gong to relieve medical issues such as headaches and depression as it was not supported by documentary evidence that her symptoms had subsequently improved. While she had basic knowledge of Falun Gong, her husband did not demonstrate familiarity with the faith. The RPD gave little weight to the applicants' evidence that they were genuine Falun Gong practitioners in Canada and concluded that they were unlikely to practice Falun Gong upon their return to China.

B. *The RAD decision*

[13] The applicants submitted to the RAD a Notice of Arrest issued on May 9, 2016 and a Jail Visiting Card issued on May 18, 2016. These documents were faxed to the applicants. The RAD declined to admit the new evidence under subsection 110(4) of the IRPA, finding that the applicants failed to explain why these documents were not reasonably available prior to the rejection of their claim by the RPD on May 24, 2016.

[14] The RAD noted credibility concerns relating to (1) the applicants' submissions on going into hiding, (2) the PSB visits, (3) the summons, and (4) the applicants' ability to exit China undetected. The RPD was particularly concerned with the alleged timing of Ms. Gu's going into hiding and the inconsistent evidence about the two addresses declared on her intake form. The RAD noted that the applicants made no submissions regarding these central concerns.

[15] The RAD concurred with the RPD's assessment of the summons as it too found that it was contrary to common sense to have Ms. Gu report in a province other than her own. Moreover, it was reasonable to conclude that an arrest warrant or a coercive summons would have been issued as a result of failing to appear.

[16] The fact that the applicants' families were able to carry on with their normal lives without interference from the PSB was also considered to be concerning. The RAD found that the RPD's treatment of that issue was without error.

[17] The RAD was also concerned with the applicants' ability to exit China on genuine passports while the PSB allegedly sought them. 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. The RAD found that the lack of detail regarding the actions of the smuggler provided by the applicants undermined their allegations that they were assisted by a smuggler to bypass security in China.

[18] The RAD distinguished decisions of this Court regarding implausibility findings relating to applicants exiting China using their own genuine passports: *Zhang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 533, [2008] FCJ No 678 [*Zhang*]; *Sun v Canada (Minister of Citizenship and Immigration)*, 2015 FC 387, [2015] FCJ No 347 [*Sun*]; *Ren v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1402, [2015] FCJ No 1493 [*Ren*].

[19] The RAD concurred with the RPD's finding that the applicants had not established that Ms. Gu was a genuine Falun Gong practitioner in China. Even if she had practiced Falun Gong in Canada, the RAD found that she had not established that the Chinese authorities were aware of this. As such, the RAD upheld the RPD's rejection of the *sur place* claim due to credibility concerns.

IV. ISSUES

[20] There is no disagreement between the parties, and I agree, that 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*].

[21] A preliminary issue arose from the inclusion in the Applicants' Record of a new certificate of translation dated September 28, 2016, two weeks after the RAD decision on September 14, 2016. This was raised as a concern by the respondent in her leave materials and was not addressed by the applicants in reply.

[22] It is trite law that judicial review of an administrative decision is made on the basis of the evidence that was before the decision-maker. Additional evidence is only admissible in very narrow circumstances, where it may be needed to resolve issues of procedural fairness or jurisdiction: *McKenzie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 719, [2015] FCJ No 718 at para 44; see also *Alabadleh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 716, [2006] FCJ No 913 at para 6; *Ontario Association of Architects v Association of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 FC 331 at para 30.

[23] As the submission of the new certificate raised no question of procedural fairness or any jurisdictional issue, it was excluded as evidence after the parties were given an opportunity to make brief oral argument on the issue.

[24] Aside from the preliminary matter, this application raises the following issues:

- A. Were the RAD's credibility findings reasonable?
- B. Did the RAD err in rejecting the *sur place* claim?
- C. Did the RAD err in declining to admit the applicants' new evidence?

V. ANALYSIS

- A. *Were the RAD's credibility findings reasonable?*

[25] In refugee matters, the "assessment of credibility is the very core of the expertise of administrative tribunals, and it is closely related to the facts of a given case": *Florez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 659, [2016] FCJ No 636 at paras 18-19. The RAD's reasons are detailed and demonstrate a thorough consideration of the documentary evidence in the record.

[26] Central to the applicants' claim is that they fear returning to China because Ms. Gu is wanted by the Chinese authorities for being a Falun Gong practitioner. I do not agree with the applicants' argument that the RAD's assessment of their time in hiding was "microscopic". It was reasonable for the RAD to assess the evidence and surrounding circumstances in detail to determine the applicants' credibility.



[27] The RAD reasonably drew a negative inference from Ms. Gu's testimony regarding the timing of her hiding given the inconsistent information provided in her BOC and at the RPD hearing. It was also appropriate for the RAD to show some deference to the RPD's assessment and findings on the credibility issues arising from the oral evidence which the RPD had heard: *Huruglica*, above, at para 103.

[28] The RAD's rejection of the summons has to be reviewed in the context of the totality of the evidence before it. The RAD agreed with the RPD that little weight should be assigned to the red stamp on the summons in light of the objective evidence that such documents are easily counterfeited with the aid of an ink jet printer. The principle that such documents that appear to be genuine on their face are to be presumed to be authentic does not apply when there are valid reasons to doubt the authenticity.

[29] The RAD's conclusion on the authenticity of the document was primarily guided by the fact that on the face of the translation submitted by the applicants, Ms. Gu was asked to report in a province in which she did not reside. The responsibility for ensuring that the translation of this document provided to the RPD was accurate rested with the applicants. The RPD was not required to confront the applicants with this discrepancy; the principles of procedural fairness do not require the Board to confront the applicant with information that they had supplied themselves: *Aguilar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 150, [2012] FCJ No 146 at para 31.

[30] As noted above, there are no exceptional circumstances that would permit the introduction of a new translation of the document: *Bekker v Canada*, 2004 FCA 186, [2004] FCJ No 819; *Bema v Canada (Minister of Citizenship and Immigration)*, 2007 FC 845, [2007] FCJ No 1103 at para 11.

[31] The applicants' attribute weaknesses in their RAD submissions to their former counsel but that does not explain the inconsistencies in their evidence before the RPD.

[32] The RAD cannot be impugned for failing to consider the recent explanations given with respect to Ms. Gu's evidence about the applicants' two addresses, because the RAD did not have the benefit of these explanations. The RPD did not simply ask "where is home" as the applicants suggest. The respondent points to the relevant portions of the audio recording of the hearing before the RPD when the inconsistency was raised by the RPD member. The audio recording reveals that Ms. Gu testified that she lived at a specific address from December 2015 until she left for Canada.

[33] The RAD reasonably assessed the evidence surrounding the applicants' exit from China. It distinguished *Zhang, Ren* and *Sun* given the factual differences in those cases. Unlike in *Zhang*, neither the RAD nor the RPD engaged in the speculation that hundreds of officials would have to be bribed to exit China. In *Ren*, the claimant's testimony that he used a smuggler and that his passport was never scanned went uncontroverted. In this case, however, the applicants' testimony regarding their reliance on the smuggler and how they were assisted was vague and lacked detail.

[34] The RAD properly pointed out that the RPD's decision in *Sun* was based on the evidence available in an earlier version of the National Documentation Package (NDP). In this case, however, the RAD's conclusions about the plausibility of the applicants' ability to leave China using their genuine passports was based on a review of the most current information in the July 2015 NDP. Moreover, while this Court in *Sun* found that the RPD's assessment of the applicant's ability to leave China on his own passport was unreasonable, the same conclusion does not follow in the circumstances of this case.

[35] I agree with the respondent that each of these cases have to be decided on their own facts. The RAD's detailed assessment of the documentary evidence relating to the Golden Shield system provides its conclusion a rational basis, which this Court should not interfere with. The applicants have not shown how the RAD's conclusion lacks justification, transparency, and intelligibility.

[36] The RPD found that Ms. Gu displayed some knowledge of the practice of Falun Gong. The RAD agreed with the RPD that the credibility concerns undermined her ability to establish her identity as a genuine FG practitioner. The applicants rely on this Court's decision in *Ren*, above, to argue that the RAD failed to assess the evidence relating to the applicants' status as Falun Gong practitioners independent of its previous credibility findings.

[37] In my view, the applicants' reliance on this Court's decision in *Ren* is misplaced. In that case, Justice Boswell, at paragraph 25, held that the RAD has to "deal separately and squarely with the documentary evidence before coming to an overall credibility finding" [emphasis in

original]. In that case, Justice Boswell was referring to the RAD's erroneous reasoning in importing its overall credibility finding to a specific document such as a summons.

[38] In this matter, however, the RAD individually assessed all of the evidence before it, and based on an assessment of that evidence, it concluded on a balance of probabilities, that the applicants were not genuine Falun Gong practitioners. The RAD did not engage in impermissible inverted reasoning. Therefore, I see no reason to interfere with the RAD's assessment of the applicants' credibility or its conclusion.

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

[39] The RAD acknowledged that Ms. Gu demonstrated some knowledge of Falun Gong but did not place much weight on a letter and photographs from a fellow practitioner in Canada. It found that the applicants had not established that the Chinese authorities were aware of their involvement with Falun Gong in Canada even if they were engaged in monitoring such activities in this country.

[40] It was open to the RAD to take its negative credibility findings into account in considering the *sur place* claim: *Zhou v Canada (Minister of Citizenship and Immigration)*, 2015 FC 5, [2015] FCJ No 2 at paras 22-23, 25 [*Zhou*]. In *Zhou*, at paragraph 23, this Court found that "it is permissible for the RPD to assess an applicant's genuineness and therefore his *sur place* claim in light of credibility concerns relating to the original authenticity of a claim".

[41] Similarly, I would conclude that based on the totality of the evidence provided by the applicants, it was not unreasonable for the RAD to find that the practitioner's letter and photographs were insufficient evidence to establish the *sur place* claim.

C. *Did the RAD err in declining to admit the applicants' new evidence?*

[42] The applicants submit that they only learned of the arrests of other members of the Falun Gong practice group in a phone call with Ms. Gu's mother in late May 2016 following the RPD hearing. The Notice of Arrest, issued on May 9, 2016 and Jail Visiting Card dated May 18, 2016 were then faxed to the applicants. The RAD declined to admit the new evidence under subsection 110(4) of the IRPA, finding that the applicants failed to explain why these documents were not reasonably available prior to the rejection of their claim by the RPD on May 24, 2016.

[43] It is unclear exactly when Ms. Gu spoke to her mother following the RPD hearing which took place on April 22, 2016. Even if they were unable to physically obtain the documents before the decision was rendered a month later, it was open for the RAD to conclude that they could have notified the RPD of the existence of new evidence prior to the issuance of the decision. No evidence was provided of any efforts to do so.

[44] While the Court may have reached a different decision on the admissibility of the evidence, I see no reason to interfere with the RAD's decision. In any event, given the overarching credibility concerns raised by the RPD and confirmed by the RAD, the RAD's decision to exclude the two new documents is immaterial.

VI. CONCLUSION

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

[46] In a post-hearing submission, counsel for the applicant advised the Court that no questions for certification would be submitted as the law in this area was clear. No questions were proposed by the respondent.

**JUDGMENT in IMM-4239-16**

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

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4239-16

**STYLE OF CAUSE:** QUIYING GU  
FENG GAO  
V THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 8, 2017

**JUDGMENT AND REASONS:** MOSLEY, J.

**DATED:** JUNE 2, 2017

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