

Federal Court



Cour fédérale

Date: 20170911

Docket: IMM-410-17

Citation: 2017 FC 823

Ottawa, Ontario, September 11, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**HUA LI
YUE FANG
QIAOYA FANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Refugee Appeal Division (“RAD”) of the Immigration and Refugee Board of Canada, dated December 27, 2016, which confirmed the decision of the Refugee Protection Division (“RPD”) that the Applicants are not Convention refugees or persons in need of protection pursuant to s 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

Background

[2] The Applicants are a family of three, Li Hua (“Principal Applicant”), her husband, Yue Fang (“Secondary Applicant”), and their minor child. They are all citizens of China. They claim that the adult Applicants are being sought by the Chinese Public Security Bureau (“PSB”) for denouncing corrupt Chinese government officials in connection with compensation for the expropriation of a village home in Hubei Province, owned by the Principal Applicant and occupied by her parents.

[3] The Applicants claim that in September 2015, the Principal Applicant, who lived in Beijing, went to meet with the villagers. She and four other people were elected to organize other villagers regarding the issue of compensation. The villagers learned that government officials at different levels had misappropriated much of the compensation money. A complaint was filed with various government departments seeking fair compensation and serious punishment for the corrupt officials involved, but this was ignored. On October 1, 2015, two hundred villagers organized a sit-in demonstration at city hall. There, all of the representatives, including the Principal Applicant, were taken to the police station and detained for four days where they were warned not to cause more trouble, beaten, and shouted at. The Principal Applicant returned to Beijing after her release. Efforts were made to publicize the problem but articles posted on the internet were deleted and internet accounts shut down. The Applicants claim that media outlets and lawyers were too scared to take on the cause.

[4] The Secondary Applicant returned to China from a visit with his parents in Canada in November 2015. It was decided to file a petition with the State Bureau of Letters and Calls in Beijing (“State Bureau”), in the belief that officials in Beijing would not act with the same level of impunity. The Secondary Applicant took the signed petition to the State Bureau on December 14, 2015. He claims that while there waiting in line, people in plain clothes purporting to be police officers arrived and seized the petition from him. The Secondary Applicant and five or six other petitioners were taken to an unknown “black prison”. There he was detained for four days, admonished by officials for staining the appearance and image of a capital city and disrupting its safety and stability, punched and kicked, and was warned that further violation would result in imprisonment. The petition was deemed illegal as the correct procedure would have been to file it with the provincial government before approaching the central government. The Secondary Applicant returned to the State Bureau on December 30, 2015, and successfully filed a second petition.

[5] The Applicants came to Canada on January 25, 2016, to spend Chinese New Year with the Secondary Applicant’s parents. They claim that on February 16, 2016, PSB officers visited the Principal Applicant’s parents, asking the Applicants return to China from Canada and surrender. The PSB said the Applicants had incited and organized people to unlawfully assemble, attacked the government in a petition, and spread rumours to ruin social stability. The Principal Applicant’s parents also informed her that the other four village representatives had been arrested by the PSB. Not long after the PSB visited the Principal Applicant’s parents, a cousin who was taking care of the Applicants’ home in Beijing received letters there from the

adult Applicants' employer terminating their employment. The Applicants then claimed protection in Canada.

RPD Decision

[6] The RPD held that the determinative issue was credibility. It drew negative inferences from the Secondary Applicant's evidence that he returned to the same State Bureau to file a second petition, having been detained and assaulted a few days before to the point that he feared for his life; from his ability to file a successful petition on December 30, 2015, following the aggressive and pre-emptive actions taken by the Chinese authorities during his first attempt; regarding the Secondary Applicant's testimony surrounding his detention in a "black prison" due to internal inconsistencies in his testimony; and, from the Applicants' evidence that they travelled to Canada for leisure purposes in the absence of corroborative evidence where such material was reasonable to expect.

[7] The RPD found that the cumulative negative credibility inferences concerning central aspects of the claims undermined the credibility of the Secondary Applicant generally, which lack of credibility extended to all aspects of the claim, including the documentary evidence, which was accordingly assigned little weight. The RPD also noted the availability of fraudulent documents in China. As to the documents pertaining to the land appropriation, these did not indicate, in and of themselves, that the adult Applicants had protested against the Chinese government and the subsequent events. Overall, the RPD was not satisfied that the adult Applicants took part in protests, petitioning, or other activities that were contrary, or perceived to

be contrary, to the Chinese government. Therefore, the RPD was not satisfied that the Chinese authorities were seeking them because of those actions and their claims were not established.

Decision Under Review

[8] The two issues raised on appeal to the RAD were whether the RPD erred in assigning little to no weight to independent documentary evidence corroborating their allegations, and in making its global negative credibility finding. No new evidence was submitted, nor was an oral hearing requested.

[9] The RAD held the RPD did not err in finding, on a balance of probabilities, that the Secondary Applicant would not have sought to petition the State Bureau a second time after being arrested, detained, and beaten. The RAD was not persuaded that the case of *Tshibola Kabongo v Canada (Citizenship and Immigration)*, 2012 FC 313, was relevant to the Applicants' circumstances as they submitted. This was because the Secondary Applicant was not engaged in political dissent against an authoritarian government, but was merely seeking a larger payment for his in-laws. Further, the Secondary Applicant, who held a management position in a state-owned enterprise, would not have risked his livelihood or his existing arrangements to travel with his family to Canada and the United States by seeking to file a petition a second time.

[10] As to the documentary evidence that government security officials forced petitioners to return to their home provinces, the RAD stated that the Secondary Applicant did not participate in the local petitioning and demonstrations because he was in Canada during this time. The Secondary Applicant was also a resident of Beijing and provided no evidence that he was known

to officials in Hubei province as the carrier of a petition concerning a locality in that province. The RAD also found that Hubei officials would be informed after the first petition was brought to the attention of the central government, but that it strained credulity that they would have been made aware of the first petition as it was never filed.

[11] Further, that the Secondary Applicant would be forcibly removed while in line at the State Bureau also strained credulity. While the documentary evidence indicated retaliation against petitioners, the RAD found on a balance of probabilities that such actions would not take place inside a central government office responsible for receiving petitions. While the RAD acknowledged that security officials from a province in Hubei might be sent to Beijing to constrain petitioners, it found it strained credulity that such officials would not only arrest and detain a person carrying a petition involving that locality, but also other petitioners from a number of other jurisdictions.

[12] The RAD also found that if a locality like Hubei was so concerned about the petition and was aware that the Secondary Applicant was the petitioner, it was likely, on a balance of probabilities, that he would have been prevented from petitioning a second time.

[13] The RAD concurred with the RPD that the Secondary Applicant's testimony concerning "black prisons" was confusing, changing, and inconsistent. Overall, the RAD concurred with the RPD that the Secondary Applicant's evidence lacked truthfulness regarding petitioning the State Bureau twice, being detained and beaten, and being held in a "black prison". Further, the RAD agreed with the RPD's negative inference respecting the Applicants' purpose for coming to

Canada in the absence of corroborative evidence, other than their United States Visas which the RPD had not addressed. The RAD found expecting corroborative evidence was reasonable in the circumstances.

[14] As to the treatment of the documentary evidence, the RAD agreed with the Applicants that the RPD was obligated to consider the documentary evidence the Applicants provided to corroborate their allegations. The RAD then addressed each piece of the documentary evidence in turn. It found no basis to challenge the authenticity of the Notice of Detention indicating government officials detained the Principal Applicant for four days because she participated in a rally concerning the expropriation of village land. However, this did not, in and of itself, corroborate the Applicants' allegation that the Chinese authorities currently pursue them. As to the Notice of Arrest concerning the Secondary Applicant, the RAD found this to be "clearly fraudulent". The document indicated that the Secondary Applicant was arrested on February 16, 2016, however, the Applicants were in Toronto on that date and the Secondary Applicant was allegedly arrested and detained on December 14, 2015. The Notice of Arrest therefore enhanced the RAD's concern as to the credibility of the Applicants' allegations. The fraudulent Notice of Arrest also raised doubt about the authenticity of the two termination of employment notices ("Employment Termination Notices").

[15] The RAD also found that the PSB would have likely issued a written summons and arrest warrant. The lack of summons or arrest warrant raised significant doubt that the adult Applicants were being pursued by the PSB because of their alleged activities (*Sun v Canada (Citizenship and Immigration)*, 2008 FC 1255).

[16] The RAD concluded that the Applicants failed to establish that they are being sought by the Chinese authorities and advanced insufficient credible evidence to make a positive finding on the appeal.

Issues and Standard of Review

[17] The Applicants identify two issues, being whether the RAD erred in its credibility assessment and in rejecting the Applicants' documentary evidence. Findings regarding credibility attract the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Owochei v Canada (Citizenship and Immigration)*, 2012 FC 140 at para 20; *Li v Canada (Citizenship and Immigration)*, 2015 FC 354 at para 9). At the hearing before me, the Applicants submitted that the RAD's treatment of the Notice of Arrest raises an issue of procedural fairness, attracting the correctness standard. The Respondent did not take issue with this and I agree that correctness is the standard of review for matters of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[18] In my view, the determinative issue in this matter is the RAD's treatment of the documentary evidence.

Applicants' Position

[19] The Applicants submit the RAD erred in dismissing their supporting documents. The RAD found the Notice of Arrest to be “clearly fraudulent” because it was intended to prove the arrest of the Secondary Applicant, yet the date of the arrest was stated to be February 16, 2016, and the Secondary Applicant was in Canada at that time. The Applicants submit that the RAD wholly misread the document, which clearly stated that the arrest was of Feng Zou, who was one of the village representatives who had assisted with the mass rally and the petition. The arrest date also coincided with and corroborated the Applicants’ claim that the other village representatives were arrested on February 16, 2016. The Notice of Arrest also stated the reason for the arrest, being the organization of a mass rally. The RAD should have made inquiries to verify who the Notice of Arrest was referring to. Moreover, the Applicants were not given an opportunity to address this concern, which the RPD did not address, resulting in a breach of the duty of fairness as the RAD had the burden of ensuring that issues which are determinative of the claim are raised with the Applicants (*Sarker v Canada (Citizenship and Immigration)*, 2014 FC 1168 para 19 (“*Sarker*”). In any event, an incorrect date in and of itself is not sufficient to support a finding that the document was “clearly fraudulent” since an official document might still contain a date error.

[20] The RAD also gave the Employment Termination Notices no weight solely because of its concerns with the fraudulent Notice of Arrest. The Applicants submit that the Employment Termination Notices outlined the reasons for the dismissals and therefore offered further proof of the Applicants’ issues with the government, had the RAD accepted them. The RAD also found

no reason to doubt the Detention Notice as proof that the Principal Applicant organized the rally and was detained. The Applicants submit the finding of fraud eliminated any credibility they could have gained from the documents that proved other parts of their story and unfairly deprived them of the truth of their testimony.

[21] Having accepted that the Principal Applicant had been detained, the RAD also erred in concurring with the RPD that, while there was evidence of land expropriation, the Applicants had failed to show that their involvement put them at risk of persecution. There was no basis for dismissing the significance of this document when it went to the core of the claim.

[22] The Applicants' submit that a breach of procedural fairness arises from the RAD raising the absence of a summons. The RPD did not address this issue and the Applicants were therefore not given an opportunity to do so. Further, the RAD's finding ignores more recent case law which recognizes that issuing summons in China varies regionally (*Zeng v Canada (Citizenship and Immigration)*, 2014 FC 1060 at paras 26-28).

Respondent's Position

[23] The Respondent submits that the Applicants have not demonstrated the RAD unreasonably assessed their documentary evidence. As to the Notice of Arrest that the RAD found to be clearly fraudulent, the Respondent acknowledges that the document was for Feng Zou, and not the Secondary Applicant as the RAD thought. However, in the written submissions of the Applicants' former counsel to the RAD, it was stated that the document refers to "The Appellant's arrest as a result of filing of a petition in Beijing". Nor did the Applicants'

former counsel explain who Feng Zou was or how the February 2016 arrest supported their claim. According to the Respondent, the RAD cannot be faulted for failing to notice that the Notice of Arrest was issued to another person in these circumstances. Accordingly, the RAD reasonably found the document to be fraudulent and, by extension, to doubt the authenticity of the Employment Termination Notices. The RAD was not under a duty to raise the issue with the Applicants and the error is of no consequence because the RAD had already found the Applicants' story of being a petitioner to be not credible.

[24] The Respondent also distinguishes *Sarker* and submits the Applicants already raised the failure of the RPD to consider documentary evidence that independently corroborated their claims as capable of supporting a positive determination. The Applicants knew that the RPD doubted their credibility and the case to be met. Since the Applicants raised the question of independent evidence, it was open to the RAD to take into account the absence of a summons, it was under no duty to raise this with the Applicants, and its negative inference was reasonable.

Analysis

[25] In my view, it is apparent that the RAD made an error of fact regarding the Notice of Arrest, which clearly states that it is issued to Feng Zou's family members. Further, that Feng Zou was arrested on February 16, 2016 "due to his organizing a mass rally and spreading rumours to disturb social stability, as well as leapfrogging a petition against the people's government". The Translator's Declaration for the Notice of Arrest describes the document translated as the "Notice of Arrest from the People's Republic of China re Hua Li's Fellow Villager, Feng Zou". Further, the Basis of Claim form of the Principal Applicant states that on

February 16, 2016, her parents advised her that the PSB visited them on that day and asked her parents to tell the Applicants to return to China and surrender. The PSB alleged the Applicants incited and organized people to take part in an unlawful assembly, attacked the government by means of a petition, and spread rumours to ruin social stability. The Principal Applicant's parents also told her that the four other village representatives had been arrested. Additionally, the December 25, 2015 petition states that "We are the villagers, Yewei Yang, Hua Li, Feng Zou, Pengju Xiao and Hua Tong..." and reports the named mayor and the property developer for allegedly embezzling compensation money and depriving village home owners of the state confirmed amount. The petition further notes that the representatives, on behalf of the villagers, reported the situation, but the government did not respond. Consequently, the representatives organized a sit-in, which the police disbursed, detaining the representatives for several days. The petition sought help from the central government in upholding justice, investigating the local officials' corrupt practices, and effecting political reform.

[26] While it is true that former counsel for the Applicants in written submissions to the RAD erroneously described the Notice of Arrest as referring to the Appellant's [Secondary Applicant] arrest as the result of filing a petition in Beijing, unremarked upon by the RAD is that the document clearly states that it concerns the arrest of Feng Zou, not the Secondary Applicant. Had the RAD reviewed the Notice of Arrest, this would have been apparent. Similarly, the Translator's Declaration identified the Notice of Arrest as pertaining to Feng Zou. Further, the petition, which was also found on the record before the RAD, identified by name Feng Zou as one of the five village organizers along with Hua Li, the Principal Applicant. Accordingly, I do not agree with the Respondent that it was reasonable for the RAD to find the Notice of Arrest to

be clearly fraudulent based on its reliance on, and failure to notice the error in, the Applicants' written representation. Nor that it was reasonable to expect former counsel would, having made this error, then explain who Feng Zou was or how his or her arrest was relevant.

[27] Because the RAD found the Notice of Arrest to be fraudulent, it also found that this enhanced its concerns as to the credibility of the Applicants' allegations, specifically noting the Secondary Applicant's allegation that he was arrested and detained as a result of his petitioning the State Bureau on December 14, 2015, and held in a "black prison". However, as noted above, the Notice of Arrest did not pertain to the Secondary Applicant. Thus, the enhanced credibility concerns regarding the Secondary Applicant were based on the finding of the Notice of Arrest to be fraudulent were also unreasonable. Further, the RAD found no reason to doubt the Detention Notice as proof that the Principal Applicant organized the rally and was detained. Thus, to the extent that the finding that the Notice of Arrest was fraudulent negatively impacted the credibility of the Principal Applicant in that regard, this too was unreasonable. Similarly, the RAD doubted the authenticity of the Employment Termination Notices for the adult Applicants based on its finding that the Notice of Arrest as fraudulent. This may have significance because those notices stated the reasons for termination and postdated the Applicants' departure from China.

[28] In my view, the RAD's factual error is reviewable as it served to improperly discount independent corroborating evidence that could potentially have supported the Applicants' claim and improperly raised doubt as to the adult Applicants' credibility (*Malveda v Canada (Citizenship and Immigration)*, 2008 FC 447 at para 24; *Valtchev v Canada (Minister of*

Citizenship and Immigration), 2001 FCT 776 at para 7). In particular, the Notice of Arrest corroborates the Principal Applicant's claim that that her parents advised her that the four other village representatives had been arrested after her departure for China. As I cannot ascertain if the outcome would have been different had the error not occurred, the matter must be remitted for consideration by a different RAD panel. Given my conclusion in this regard it is not necessary to address the other issues raised by the parties.

JUDGMENT IN IMM-410-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the RAD is set aside and the matter is remitted for redetermination by a different panel;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

“Cecily Y. Strickland”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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