Federal Court  Cour fédérale

Date: 20171129

Docket: IMM-1696-17

Citation: 2017 FC 1074

Toronto, Ontario, November 29, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

QIANQIAN FU
HUAPENG HU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Chinese Applicants, QianQian Fu and HuaPeng Hu, are spouses who claim to be members of the Church of the Almighty God [Church]. The Church is illegal in China. The Applicants unsuccessfully sought refugee status in Canada, based on religious persecution in China. The Refugee Protection Division [RPD] denied the claim at first instance, finding that the Applicants were not genuine Church adherents. The Refugee Appeal Division [RAD] later agreed with the RPD that the Applicants were not credible and refused to take notice of or admit

new information on appeal [Decision]. I have concluded that the Decision is both incorrect and unreasonable based on two evidentiary issues, and will accordingly allow this application for judicial review [Application].

I. Background

[2] In early 2010, Mr. Hu came to study in Canada, while Ms. Fu remained in China. Ms. Fu's evidence was that she became depressed in China after Mr. Hu left, because she was not advancing in her career like her friends. She stated that her cousin, noticing a change in her behavior, introduced Ms. Fu to the Church in January 2012. Ms. Fu's evidence was that she was afraid to practice the illegal religion, but that she began by praying with her cousin at home, which caused her to gain confidence. She stated that, in March 2012, she joined a house Church and thereafter attended services once a week, with "good safety precautions".

[3] The Applicants claimed that Mr. Hu travelled to China in August 2012 to marry Ms. Fu. Ms. Fu stated that Mr. Hu was worried because she had joined an illegal religion and told her to be cautious. Ms. Fu claimed to have then travelled to Canada with Mr. Hu on October 24, 2012.

[4] Ms. Fu stated that, after she arrived in Canada, she learned from her cousin that the Chinese government had begun suppressing her colleagues at the Church, that the situation was "very tense" and that her cousin had stopped attending services. Ms. Fu stated that she then located a Church in Toronto, and she and Mr. Hu started attending services there in January 2013. Ms. Fu further says that her cousin told her in March 2013 that their Church in

China had resumed services, but that its members had more safety precautions and had to be "extremely careful".

[5] Ms. Fu claimed that she received a call from her mother in June 2016, stating that her cousin had been arrested during a Church service, and that the Public Security Bureau [PSB] then came to Ms. Fu's parents' home to ask questions about connections between the family and the Church. Ms. Fu stated that the PSB came back the next day, threatened her mother, and left a summons requiring Ms. Fu to return to China within one month [Summons]. Ms. Fu says she talked about these matters with fellow Church members in Toronto and was advised to make a refugee claim. Ms. Fu's Basis of Claim form, submitted on behalf of herself and Mr. Hu, was signed July 21, 2016.

[6] The RPD dismissed the Applicants' claim on the basis that it was not credible. The RPD accepted that Church members are persecuted in China, but found that the Applicants were not genuine adherents. It made these findings in part because the Applicants had waited three and half years after arriving in Canada to make a refugee claim.

[7] The RPD also had a major credibility concerns arising from the fact that Mr. Hu's passport did not contain exit and entry passport stamps from Canada to show that he had returned to China in the summer of 2012 to marry Ms. Fu. The RPD found that it was plausible, but not probable, that the stamps were missing due to human error. It noted that Mr. Hu had testified that he and Ms. Fu had travelled together, sat beside each other, and passed through customs together. The RPD found it was not credible that the customs official would stamp Ms. Fu's

passport but not Mr. Hu's. In the RPD's assessment, this negative credibility finding seriously undermined the Applicants' claim.

[8] On appeal to the RAD, the Applicants attempted to submit new evidence under section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], or to have the RAD take notice of the facts therein, including (i) a copy of a Government of Canada website page stating that upon entry, "[t]he officer will stamp your passport with a date, or let you know how long you can stay in Canada", and a second stating that an officer "may" stamp a visitor's passport [the GC Websites]; (ii) copies of postings from various private websites and message boards speaking to the same issue of passport stamps; (iii) copies of photos of a marriage ceremony dated September 23, 2012; (iv) a copy of a boarding pass for "Toronto/Beijing" in the name of "Hu/Huapeng", dated July 30 (no year visible); and (v) Government of Canada travel history information relating to Mr. Hu.

[9] The Applicants also requested that the RAD hold an oral hearing under section 110(6) of IRPA on the basis of this new evidence and the credibility findings to which it was relevant. The RAD did not accede to this request for an oral hearing because it neither admitted the "new" evidence, nor found that any other criteria permitting an oral hearing were met.

II. Standard of Review

[10] The RAD's assessment of the evidence, and findings of mixed fact and law, are to be reviewed on a standard of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 51, 54, and 57).

The parties agree that procedural fairness breaches, on the other hand, attract a correctness review, which I will accordingly apply, notwithstanding that this is currently the subject of some dispute (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 11).

III. Issues and Analysis

[11] The Applicants point to evidence that they argue the RAD erred in (1) addressing, (2) overlooking, and (3) excluding. I will consider each issue below in turn. I will then address the Respondent's argument that the RAD's finding on the Applicants' lack of subjective fear, which it inferred from their delay in seeking refugee status, was determinative of the Decision.

A. *Evidentiary Issues*

(1) Unfairly Addressed Evidence

[12] The Applicants argue that the RAD breached principles of procedural fairness by making credibility determinations distinct from those raised by the RPD in relation to the Summons without affording the Applicants any opportunity to respond. The Respondent counters that the RAD was entitled to make credibility determinations without a hearing as there was no new evidence before it, and that no rules of natural justice were breached.

[13] In the Decision, the RAD made several determinations in respect of the Summons not raised by the RPD. For instance, the RAD found that, if the Applicants' allegations were true, the PSB would have initially used a more forceful state instrument, such as a coercive summons or an arrest warrant. It further found that the PSB would have at least issued a coercive summons

following Ms. Fu's non-compliance with the original Summons. As there was no evidence before the RAD that a coercive summons had been issued or received by the Applicants' family in China, it found that the Summons was not credible.

[14] The RAD has a duty to allow parties to address pivotal new matters not raised by the RPD (*Ehondar v Canada (Citizenship and Immigration)*, 2016 FC 1253 at paras 13-14). In *Ortiz v Canada (Citizenship and Immigration)*, 2016 FC 180, Justice Shore faulted the RAD for raising doubts about the genuineness of a police report, which were neither raised as an issue by the RPD, nor put to the applicant (at para 22). In another case, Justice Hughes found that where "the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions" (*Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10).

[15] Here, I agree that there was a breach of procedural fairness: the Applicants were entitled to an opportunity to respond to the RAD's "frolic" into Chinese criminal procedure because these concerns were not raised by the RPD. While this Court has the discretion to dismiss a judicial review application notwithstanding breaches of procedural fairness (*Bergeron v Canada (Attorney General)*, 2017 FC 57 at paras 73-74), I will not do so in this case. As discussed further below, the Decision was neither reasonable nor inevitable in spite of the RAD's breach of procedural fairness and thus must be reconsidered.

(2) Overlooked evidence

[16] This application raises the issue of how this Court should treat material evidence that has, to this point, been overlooked by all involved, even though it was contained in the record before both the RPD and the RAD. Specifically, the Applicants draw this Court's attention to Global Case Management System [GCMS] notes, which were in the Certified Tribunal Record [CTR] and as such before both the RPD and RAD, but which went unaddressed. One line buried in the GCMS notes states that Mr. Hu's "Last Entry Date" was "2012/10/24". This Canadian government data thus corroborates his travel claim, and undermines the RPD's and RAD's findings that Mr. Hu did not travel into Canada on the date in question.

[17] The Applicants submit that, although this evidence was overlooked by all counsel and both the RPD and RAD, it is "unequivocal" evidence that Mr. Hu travelled on the dates he says he did. The Applicants submit that the RAD's finding that Mr. Hu did not return to China in 2012 was critical to its analysis, and that there has thus been a "mistake of fact", such that the Decision must be quashed and the significance of the GCMS notes argued before the RAD.

[18] The Respondent answers that the GCMS notes are first of all inadmissible and in any event do not overcome the Applicants' other credibility issues. The Respondent has not argued that the oversight was due to any lack of diligence on the part of the Applicants.

[19] I disagree that the GCMS evidence is somehow "inadmissible" in this Application. It has always been a part of the documentary record in this matter, although its significance was

apparently overlooked by all involved. The GCMS notes are indeed highly probative, although not "unequivocal", evidence of certain of Mr. Hu's travel claims. Given that the lack of stamps in Mr. Hu's passport was central to the RPD and RAD's credibility concerns, this Court cannot know if the outcome of the Decision would have been different had the RAD been alerted to the GCMS evidence.

[20] These facts are highly unusual. I find that although it cannot be said that the RAD unreasonably overlooked evidence (because the GCMS notes were not brought to its attention), material evidence before the RAD was nevertheless missed. The Applicants cannot be faulted for this oversight in the circumstances. As such, I am satisfied that the overlooked evidence has resulted in an unreasonable Decision such that the RAD must reconsider its findings.

(3) Excluded Evidence

[21] As set out above, the Applicants unsuccessfully attempted to introduce new evidence before the RAD to remedy the RPD's credibility concerns. This proposed new evidence included the GC Websites, intended to corroborate the Applicants' explanation that Mr. Hu could have exited and re-entered Canada without a Canadian visa officer stamping his passport.

[22] The RAD is not limited by technical or legal rules of evidence (IRPA at section 171(a.2)), but at the same time it does not have untrammeled discretion to consider any new evidence tendered on appeal. Specifically, section 110(4) prohibits an applicant from introducing new evidence that was reasonably available prior to the claim's rejection (like the GC Websites). Thus the Applicants sought to rely on the information contained in the GC Websites on appeal

by asking the RAD to "take notice" of it, which means asking the RAD to simply accept certain facts as being "beyond reasonable dispute" (*R v Find*, 2001 SCC 32 at para 48 [*Find*]; IRPA at section 171(b)). Faced with these arguments, the RAD applied the test set out in *Find*, the leading authority on judicial notice, and determined that the information contained in the GC Websites amounted to only "informal" or "anecdotal" descriptions of Canadian laws, regulation and procedure, and as such was not appropriate to take notice of.

[23] In this Application, the Applicants maintain that the GC Websites were not "new evidence", but rather government "policy" amounting to "common procedure", which they say would have been appropriate for the RAD to consider, notwithstanding that it was not before the RPD. They submit that the RAD's failure to consult "its own government's web-site" amounted to improper adherence to strict rules of evidence and a "blatant disregard" for the truth.

[24] Because the Decision must be quashed based on my findings above on the procedural fairness and evidentiary oversight issues, it is not necessary for this Court to also determine whether the RAD unreasonably refused to take notice of, or otherwise admit, the GC Websites. However, as this Court's view on the issue may be of assistance to the parties when this matter is reconsidered, I have considered the RAD's admissibility analysis and find it to have been reasonable. A specialized tribunal is the master of its own procedure, subject to rules of fairness (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 (SCC) at 568-569). It will be up to the RAD whether it wishes to take notice of, or otherwise admit, any materials not before the RPD, when this matter is reconsidered.

B. *Delay*

[25] The Applicants waited over three years before claiming refugee protection. As a result of this delay, the RPD, and then the RAD, concluded that the Applicants lacked the subjective fear required to support their claim for refugee status. The RAD referred to the Applicants' delay as "excessive" and "determinative", finding that the Applicants' lack of subjective fear of persecution meant they were not genuine Church adherents.

[26] In arriving at its conclusion on subjective fear, the RAD noted that (i) the Applicants both confirmed that they knew the Church was illegal and considered a cult around the time they left China, (ii) Ms. Fu learned from her cousin shortly after arriving in Canada in October 2012 that the Chinese government had been "cracking down" on Church adherents, (iii) at least one practitioner in their circle had been arrested and other adherents in China had stopped attending services, and (iv) the Applicants were sophisticated, university-educated individuals, with experience in Canadian immigration processes.

[27] During the hearing of this Application, counsel for the Respondent submitted that the RAD's findings on delay were both reasonable and determinative of the RAD's Decision, such that the Application should be dismissed on that basis.

[28] Whether or not the RAD was persuaded by the Applicants' explanations for their lengthy delay in seeking status is a question of fact and owed considerable deference (*Juma v Canada (Citizenship and Immigration)*, 2015 FC 844 at para 19). However, an applicant's delay in

seeking status, in and of itself, cannot determine the outcome of a refugee claim. Justice Shore recently wrote on this issue in *Ntatoulou v. Canada (Citizenship and Immigration)*, 2016 FC 173:

> [14] The Court finds that the RPD erred in its determination that the Applicant lacked credibility because of her alleged lack of subjective fear. Neither failure to make a claim elsewhere, nor, delay in making a claim are, in and of themselves, determinative (*Pena v Canada (Minister of Citizenship and Immigration)*, 2011 FC 326 at para 4 [*Pena*]; *Hue v Canada (Minister of Citizenship and Immigration)*, [1988] FCJ No 283; *Wamahoro v Canada (Minister of Citizenship and Immigration)*, 2015 FC 889 at para 32):
>
> > [T]he long delay in making a claim must not be a pretext and is not in itself sufficient to reject a refugee claim without reviewing the other facts in the record.
> >
> > (*Malaba v Canada (Minister of Citizenship and Immigration)*, 2013 FC 84 at para 11)

[29] As the RAD's findings on "delay" could not reasonably have been determinative of the appeal before it, neither are they determinative of this Application. Further, and despite the RAD's use of the word "determinative" in respect of the Applicants' delay, the RAD's overall credibility findings were clearly made in the context of other significant evidentiary determinations which I have concluded justify this Court's intervention. Thus, the Applicants' claim — including the weight ascribed to any inferences drawn from the Applicants' delay in seeking refugee status — will have to be reconsidered by the RAD in light of the totality of the evidence.

IV. Conclusion

[30] I allow this Application for two reasons: (i) the RAD's breach of procedural fairness in failing to provide the Applicants with an opportunity to respond to new concerns raised about the Summons, and (ii) the overlooked GCMS records of Mr. Hu's travel dates. My conclusion does not turn on the RAD's findings in respect of either the admissibility of the GC Websites or the Applicants' delay in seeking status, as the former was reasonable and the latter not reasonably determinative of the issue before the RAD.

[31] The Application is granted. No questions for certification exist and none arise.

JUDGMENT in IMM-1696-17

THIS COURT'S JUDGMENT is that:

1. This judicial review is granted.
2. The matter is remitted back to the Refugee Appeal Division for reconsideration by a different Member.
3. No questions for certification exist, and none arise.
4. There is no order as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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