

Federal Court



Cour fédérale

Date: 20171218

Docket: IMM-257-17

Citation: 2017 FC 1163

Toronto, Ontario, December 18, 2017

PRESENT: THE CHIEF JUSTICE

BETWEEN:

SHOUWEN LIAO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION CANADA**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Liao, is a citizen of China who claims to be a practitioner of Falun Gong. Shortly after his arrival in Canada he sought refugee protection based on his fear of persecution in China, as a result of his pursuit of Falun Gong practices.

[2] Mr. Liao's application for protection was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on the basis of concerns that it identified with respect to the credibility of his claims and certain supporting documents he had provided.

[3] Mr. Liao then appealed to the Refugee Appeal Division [RAD], which confirmed the decision. He now submits that the RAD erred:

- i. in its assessment of his evidence regarding the concept of "attachments" in Falun Gong;
- ii. in its assessment of his knowledge of the concept of "righteous thoughts"; and
- iii. in failing to return his claim to the RPD for redetermination.

[4] I disagree. For the reasons that follow, this application will be dismissed.

II. The RPD's Decision

[5] The RPD identified the determinative issue as being Mr. Liao's credibility.

[6] In rejecting his application for refugee protection, the principal findings made by the RPD were as follows:

- i. Mr. Liao did not have a level of understanding of the importance of the concept of “righteous thoughts” to the practice of Falun Gong commensurate with the length of time he claimed to have been practising Falun Gong;
- ii. He did not have the level of knowledge of “exercise two” that one would expect of someone who had been practising Falun Gong for approximately one year;
- iii. He did not have the knowledge of the concept of “attachments” that could be expected in the circumstances;
- iv. Contrary to his assertions, it was unlikely that the Public Security Bureau [PSB] in China was looking for him. The RPD reasoned that authorities who would seek him out four times, as he alleged, would also pursue some punitive action against his family members. However, no such action occurred;
- v. The summons that he states was given to his parents by PSB authorities was not genuine; and
- vi. There was insufficient evidence to establish on a balance of probabilities that his participation in Falun Gong activities in Canada had been brought to the attention of Chinese authorities. As a result, the *sur place* aspect of his claim had not been established.

III. The RAD's Decision

[7] Before the RAD, Mr. Liao did not raise any issue with the findings that were made by the RPD in connection with “exercise two,” the above-mentioned summons, or the rejection of his *sur place* claim. Accordingly, those aspects of the RPD’s decision are deemed by the Court to have been reasonable (*Quintero Cienfuegos v Canada (Citizenship and Immigration)*, 2009 FC 1262, at para 26; *Liu v. Canada (Citizenship and Immigration)*, 2015 FC 207, at para 28; *Zhu v. Canada (Citizenship and Immigration)*, 2017 FC 615, at para 20; *Huang v. Canada (Citizenship and Immigration)*, 2017 FC 762, at para 62).

[8] Nevertheless, Mr. Liao challenged the findings that had been made by the RPD with respect to his understanding of the concepts of “righteous thoughts” and the “attachments.”

[9] At the outset of its review, the RAD noted that Mr. Liao had not submitted any new evidence in support of his application for refugee protection, and had not requested an oral hearing.

[10] After reviewing the evidentiary record, the RAD found that it was “clear from the record that [Mr. Liao] did not understand the meaning and purpose of Righteous Thoughts,” and that it was therefore open to the RPD to draw a negative inference regarding his credibility. The RAD then made essentially the same finding in respect of his understanding of the “attachments.”

[11] In addition, the RAD observed that Mr. Liao had made no submissions concerning his failure to correctly identify the purpose of “exercise two.” It noted that knowledge of the exercises and their purposes is central to Falun Gong practice.

[12] The RAD also assessed the alleged summons, even though Mr. Liao had not made any submissions in respect of it. The RAD did so after essentially found that the RPD had erred in finding that the document was not genuine, without having specifically assessed it. Upon reviewing the document, the RAD confirmed the RPD’s conclusion that it was fraudulent.

[13] Based on all of the foregoing, the RAD found that there was “insufficient truthful and credible evidence in the record to find that [Mr. Liao] was a Falun Gong practitioner in China who is being pursued by the PSP,” or that he is now a genuine Falun Gong practitioner. Therefore, the RAD confirmed the RPD’s decision that Mr. Liao is neither a Convention refugee nor a person in need of protection.

IV. Issues

[14] The three issues that have been raised on this application are as follows:

- i. Did the RAD err in its assessment of the evidence regarding Mr. Liao’s understanding of the concept of “righteous thoughts”?
- ii. Did the RAD err in its assessment of the evidence regarding Mr. Liao’s understanding of the concept of “attachments” in Falun Gong?

- iii. Did the RAD err in failing to return Mr. Liao's claim to the RPD for redetermination?

V. Standard of Review

[15] The first two issues raised by Mr. Liao are questions of fact, whereas the third issue is a question of mixed fact and law. Each of those issues is reviewable on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras 51-53 [*"Dunsmuir"*]).

[16] In conducting a review on a reasonableness standard, the Court will assess whether the decision under review falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, at para 47). The Court's focus will be on the reasonableness of the decision as a whole (*Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65, at para 3; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, at para 54).

VI. Analysis

A. *The RAD's assessment of Mr. Liao's knowledge of "righteous thoughts"*

[17] Mr. Liao submits that it was unreasonable for the RAD to have drawn an adverse inference regarding his credibility, based on his weak understanding of the meaning of the "righteous thoughts" concept in Falun Gong. This submission was based on two general grounds. First, he maintains that the concept of "righteous thoughts" is not mentioned in the *Zhuan Falun*, the primary text of the Falun Gong. Second, he asserts that the RAD should have considered that

he had only been a practitioner for less than one year, and that during that period he did not have access to Falun Gong's outlawed text. In addition, he was in hiding for approximately one month. Under these circumstances, he submits that it should not have been surprising to the RAD that he lacked detailed knowledge of the concept of "righteous thoughts."

[18] In my view, it remained reasonably open to the RAD to conclude that, while Mr. Liao had some knowledge of the concept of "righteous thoughts," it was clear from the record that he did not understand the meaning and purpose of them.

[19] When asked by the RPD about "righteous thoughts," Mr. Liao replied that "to give out righteous thoughts is to allow yourself to concentrate your cultivation and to upgrade your mind nature."

[20] However, documentary evidence quoted by the RPD explained that righteous thoughts should be directed towards reducing the general level of evil in the cosmos, rather than to cultivating one's own mind. The RPD therefore drew a negative inference with respect to Mr. Liao's credibility.

[21] When subsequently asked whether there was a method for sending righteous thoughts, Mr. Liao replied "yes, it's a movement." In response to the panel's request that he demonstrate this, he showed three hand positions, including the "conjoined" position. However, the RPD found that this was erroneous, as that position was not mentioned in the documentation from which it quoted.

[22] Based on the foregoing record, the RAD's conclusion that Mr. Liao did not understand the meaning and purpose of "righteous thoughts" was not unreasonable. In my view, that conclusion fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, at para 47). It was also not unreasonable for the RAD to find that it was open to the RPD to cite the document mentioned in the paragraph immediately above, which was a document included in the RPD's national documentation package.

B. *The RAD's assessment of the Mr. Liao's knowledge of "attachments"*

[23] Mr. Liao submits that the RAD erred by misapprehending the evidence on the record in respect of the "attachments." Specifically, he notes that when asked by the RPD to explain the concept of "attachments" in Falun Gong, he replied: "attachments come from addiction to smoking and alcohol" as well as from "jealousy." The RPD stated that his reference to addiction to smoking and alcohol was incorrect. However, the *Zhuan Falun* explicitly refers to such addictions as "attachments." This was not acknowledged by the RAD.

[24] Although the RAD appears to have failed to appreciate this error on the part of the RPD, I find that that the overall determination that it made in respect of Mr. Liao's knowledge of the "attachments" was rationally supported and reasonable. That determination was that Mr. Liao's knowledge of this concept was "at best, superficial."

[25] As noted by the RAD, "the giving up of 'attachments' is [a] central element of Falun Gong theory." According to a passage from the *Zhuan Falun* that was quoted by the RPD, the

giving up of attachments is not confined to giving up a few specific things. Rather, practitioners are advised to “lose all [of] everyday people’s attachments and various desires.” With this in mind, the RAD’s finding that Mr. Liao’s knowledge of the attachments was, at best, superficial, was not unreasonable.

[26] In reaching this finding, the RAD acknowledged that it can be difficult to make a judgment as to the genuineness of a person’s belief and practice of Falun Gong. For this reason, the RAD stated that it is necessary to consider the totality of the evidence, rather than seizing on an absence of knowledge about a particular aspect of Falun Gong. In this regard, the RAD noted that there remained a large body of concepts and practices that were not considered by the RPD, but that Mr. Liao’s counsel did not ask any questions in respect of them.

[27] Elsewhere in its decision, the RAD noted that Mr. Liao had erred when explaining the purpose of “exercise two.” As discussed above, it also found that he did not understand the meaning and purpose of “righteous thoughts.”

[28] In this overall context, the RAD’s finding that Mr. Liao’s knowledge of the “attachments” was , at best, superficial fell well “within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Dunsmuir*, above, at para 47).

C. *The RAD’s failure to return Mr. Liao’s claim to the RPD for redetermination*

[29] Mr. Liao submits that it was unreasonable for the RAD not to return his application to the RPD for redetermination, after having found that the RPD had erred in fact and in law, as contemplated by paragraph 111(2)(a).

[30] Section 111 states as follows:

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

- (a) confirm the determination of the Refugee Protection Division;
- (b) set aside the determination and substitute a determination that, in its opinion, should have been made; or
- (c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

Referrals

(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that

- (a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and
- (b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

Renvoi

(2) Elle ne peut procéder au renvoi que si elle estime, à la fois :

- a) que la décision attaquée de la Section de la protection des réfugiés est erronée en droit, en fait ou en droit et en fait;
- b) qu'elle ne peut confirmer la décision attaquée ou casser la décision et y substituer la décision qui aurait dû être rendue sans tenir une nouvelle audience en vue du réexamen des éléments de preuve qui ont

été présentés à la Section de la protection des réfugiés.

[31] With respect to the RPD's error of fact, or of mixed fact and law, Mr. Liao notes that the RAD found that there was insufficient evidence on the record for the RPD to find that he was not being pursued by the PSB.

[32] However, despite having made this finding, the RAD was not obliged to refer the matter back to the RPD for a redetermination. Paragraph 111(2)(a) states that the RAD may make the referral described in paragraph 111(1)(c), if it is of the opinion that the RPD's decision was wrong in fact, in mixed law and fact, or in law. This makes it clear that the RAD retains discretion to take one of the actions described in paragraphs 111(1)(a) and (b), rather than taking the action described in paragraph 111(1)(c), even where it finds that the RPD made one of the types of errors mentioned in paragraph 111(2)(a).

[33] Based on the findings that the RAD made with respect to Mr. Liao's insufficient knowledge of the concepts of "righteous thoughts" and the "attachments," it was reasonably open to the RAD to refrain from referring the matter back to the RPD, notwithstanding the factual error that it had identified. This is particularly so given some of the other findings or observations that it made, including with respect to his failure to correctly identify the purpose of "exercise two."

[34] Turning to the alleged errors of law, Mr. Liao asserts that the RAD found that the RPD had made two such errors. These related to the manner which the RPD assessed (i) the

genuineness of his adherence to Falun Gong, and (ii) the summons that he alleges was issued by the PSB.

[35] With respect to the genuineness of his adherence to Falun Gong, the RAD stated that the lack of knowledge of some aspects of Falun Gong theory was not, in itself, a sufficient basis for making a judgment as to the genuineness of Mr. Liao's claims in this regard. The RAD added that it is necessary to consider the totality of the evidence. It then proceeded to conclude that Mr. Liao had not led any evidence with respect to the large body of concepts and practices of Falun Gong, and that there was therefore insufficient evidence to find that he is a genuine Falun Gong practitioner.

[36] Having regard to the totality of the evidence that was before the RAD, I am satisfied that it was reasonably open to it to make this determination, and to confirm the RPD's conclusion on this point. It may well be an error to conclude that someone is not a genuine practitioner of Falun Gong, based on that person's lack of some aspects of Falun Gong. However, the RAD identified shortcomings in respect of Mr. Liao's knowledge of each of the three aspects of Falun Gong theory that he was asked about. In addition, it noted that Mr. Liao's counsel did not lead evidence or ask questions about any other concepts and practices in Falun Gong. Based on this evidentiary record as a whole, it was not unreasonable for the RAD to confirm the RPD's conclusion that there was insufficient evidence to find that he is a genuine Falun Gong practitioner, without sending the matter back to the RPD for redetermination.

[37] Regarding the summons that Mr. Liao provided to corroborate that the PSB is looking for him, the RAD found that the RPD had erred by finding that it is fraudulent simply because (i) it had already been made several negative credibility findings against Mr. Liao, and (ii) fraudulent documents are widely available in China. The RAD stated that the RPD was required to assess the document on its own, which it had failed to do. The RAD therefore proceeded to conduct its own assessment of the alleged summons, and to ultimately reach the same conclusion as the RPD.

[38] Mr. Liao submits that sending the matter back for redetermination would have allowed for further questioning by the RPD, to test the issue of the genuineness of the document. In any event, he submits that the RAD could not make a decision regarding the summons without hearing evidence from him. In support of this latter submission, he notes that the RAD made an error when it stated that the document was issued on March 23, 2016, rather than on March 22, 2016, the date upon which he stated the document had been given to his parents. This error was acknowledged by the Respondent.

[39] As I have previously noted, the RAD is not obliged to return a matter to the RPD where it concludes that the RPD has erred in fact, law, or mixed fact and law. This is so even with respect to errors that the RPD may have made in assessing credibility, including the genuineness of documents. In each case, “the RAD ought to determine whether the RPD truly benefited from an advantageous position, and, if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim” (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, at para 70 [*“Huruglica”*]). If the weight given to testimony or a document is not essential to

determining whether the RPD's decision should be confirmed or set aside, the RAD may make its own decision, without referring the matter back to the RPD (*Huruglica*, above, at para 73).

[40] In my view, the weight to be given to the alleged summons was not essential to enabling the RAD to make a conclusion with respect to Mr. Liao's refugee claim. On the contrary, there was more than a sufficient record available to the RAD to permit it to confirm or overturn the adverse credibility findings that the RPD had made in relation to Mr. Liao, and to then make a decision with respect to his refugee claim. The RAD's confirmation of those findings and the rejection of Mr. Liao's refugee claim fell well "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, at para 47).

[41] As is often the case with documents, the RAD was able to assess the genuineness of the alleged summons, based on its review of the document itself. Among other things, the RAD was able to determine from the face of the document that it was not a *chuanpiao* (ordinary summons), as had been alleged by Mr. Liao. Rather, it was an arrest summons which the RAD stated is normally issued if a person fails to respond to a *chuanpiao*. Moreover, the document referred to the authority of Criminal Code 50 of the Criminal Law of the People's Republic of China. However, the RAD noted that article 50 does not concern the issuance of a summons or an arrest summons. Rather, it concerns the possibility of a reduced sentence for a person who has been sentenced to death. In light of those findings, the error made by the RAD with respect to the date of the alleged summons was immaterial to the RAD's overall determination that the document was fraudulent.

[42] Notwithstanding the foregoing, I acknowledge that the RAD did err by raising an issue with respect to the genuineness of the summons, and then not providing Mr. Liao an opportunity to address that issue.

[43] Where the RAD raises an issue that has not been raised by any of the parties to the proceeding, and then proceeds to conduct an assessment of that issue that goes meaningfully beyond that which was conducted by the RPD (*Dahal v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1102, at paras 34-35), the RAD should provide the parties with an opportunity to address the issue (*Ching v. Canada (Citizenship and Immigration)*, 2015 FC 725, at para 71).

[44] However, on the particular facts of this case, the RAD's failure to provide Mr. Liao with such an opportunity did not constitute a material error (*Mobil Oil Canada Ltd. v. Canada – Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at 228-229; *Canada (Attorney General) v. McBain*, 2017 FCA 204, at paras 9-10; *Etienne v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1128, at para 24). This is because it is evident from the findings that the RAD made regarding the alleged summons that it is not what he claims it is, notwithstanding the minor error made by the RAD with respect to the date of the document. Moreover, the adverse determination that was made concerning the genuineness of the alleged summons was just one of several adverse determinations that were made with respect to Mr. Liao's credibility, a number of which Mr. Liao did not challenge on appeal. Stated differently, there was a substantial basis on the record to support the RAD's confirmation of the RPD's

determination, on credibility grounds, that Mr. Liao is neither a Convention refugee nor a person in need of protection.

VII. Conclusion

[45] For the reasons set forth above, this application is dismissed.

[46] At the conclusion of the hearing of this application, counsel to the parties stated that there was no serious question of general importance for certification under paragraph 74(d) of the IRPA. I agree.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.
2. There is no serious question of general importance for certification under paragraph 74(d) of the IRPA.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

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