Federal Court  Cour fédérale

Date: 20190108

Docket: IMM-1649-18

Citation: 2019 FC 18

Ottawa, Ontario, January 8, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

AIMIN FENG
QUIHONG NIU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr. Aimin Feng and Ms. Quihong Niu, husband and wife, are citizens of China who report being adherents to the Falun Gong faith. They sought protection in Canada on the basis that they fear persecution in China.

[2] The Refugee Protection Division [RPD] denied their claim for protection. In March 2018, the Refugee Appeal Division [RAD] refused their appeal. They now seek judicial review of the RAD decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The applicants submit the RAD breached procedural fairness by failing to provide notice of its intention to apply a new jurisprudential guide [Guide]. They further submit that the RAD fettered its discretion in applying the Guide and unreasonably discounted evidence in assessing their *sur place* claim. The respondent submits the decision was reasonable and the process was fair.

[3] I am not convinced that the RAD's reference to the jurisprudential guide violated the applicants' procedural fairness rights or that, in applying the Guide, the RAD fettered its discretion. However, I am persuaded that the RAD's finding that the applicants submitted fraudulent documents in support of their claim and its treatment of evidence in support of the *sur place* claim were unreasonable. The application is granted for the reasons that follow.

II. Background

[4] The applicants report that they began practicing Falun Gong in 2014. In March 2015, their Falun Gong practice group was raided by the Public Security Bureau [PSB]. They escaped. They subsequently learned that two fellow practitioners had been arrested and that they were being sought by the PSB. They left China for the United States with the assistance of a smuggler using their own passports. They entered Canada from the United States and in April 2015 initiated a claim for protection.

[5] In considering their claim, the RPD found credibility to be the determinative issue. The RPD drew numerous negative credibility inferences in respect of central aspects of the claim and found that the negative findings and inferences undermined the applicants' overall credibility. The RPD also found that a *sur place* claim had not been established.

[6] The applicants appealed the RPD's conclusion to the RAD. They perfected their appeal in July 2017. Subsequent to the appeal being perfected, the IRB released its *Jurisprudential Guide for China, Exit from China, Decision TB6-11632*.

III. The Decision under Review

[7] The RAD affirmed a number of the RPD's uncontested findings.

[8] The RAD then addressed a document that the RPD had characterized as a summons. The applicants relied on the summons to demonstrate they were being sought by the PSB. The RPD gave little weight to the summons. The RPD found it unlikely that the applicants would have been able to leave China using their own passports had a summons been issued. The RPD also noted that fraudulent documents were readily available in China and the summons could have been easily fabricated.

[9] The RAD found that the document was actually a subpoena, rather than a summons. It found that the document was inconsistent with the allegation that the PSB had arrested fellow Falun Gong practitioners and with the applicants' reported fear of arrest. The RAD then noted that it would have been reasonable to expect the PSB to have taken further action to apprehend

the applicants in light of their failure to respond to the subpoena and the PSB's reported persistent inquiries. The RAD gave little weight to the subpoena, finding it to be fraudulent, and concluded the circumstances detracted from the applicants' credibility.

[10] In addressing the applicants' exit from China, the RAD noted the reliance on a smuggler and the existence of systematic corruption in China. However, the RAD found that the evidence relating to the applicants' reliance on a smuggler was very general and that the preponderance of the documentary evidence indicated it was not possible for persons wanted by authorities in China to exit the country. The RAD noted that the recently issued Guide supported its finding in this respect.

[11] The RAD upheld the RPD's finding that the applicants had insufficient knowledge of Falun Gong to demonstrate that they were genuine practitioners.

[12] In considering the *sur place* aspect of the claim, the RAD found that photographic evidence only showed the applicants' presence at a particular location and that the evidence was not conclusive of Falun Gong membership. In addressing letters from fellow practitioners, the RAD noted the writers failed to set out their qualifications to conclude the applicants were practitioners and to address what made the applicants Falun Gong practitioners. The photographs and letters were assigned little weight. As a result, and having noted the absence of any persuasive evidence that the applicants' activities in Canada had come to the attention of authorities in China, the RAD concluded the evidence was insufficient to establish the *sur place* claim.

[13] The RAD found the applicants were neither Convention refugees nor persons in need of protection.

IV. Issues and Standard of Review

[14] The applicants raise the following issues:

A. Did the RAD's application of the Guide without providing notice to the applicants breach their procedural fairness rights?

B. In applying the Guide, did the RAD fetter its discretion and fail to assess the facts specific to the applicants' claim?

[15] In considering alleged breaches of procedural fairness, the Federal Court of Appeal recently considered what a court is being asked to assess in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific Railway Company*]. The Court of Appeal held that where fairness is in issue, a reviewing court is being asked to consider whether the process was "fair having regard to all the circumstances" and that "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond." The Court of Appeal acknowledged that there is an awkwardness in using standard of review terminology when addressing fairness questions and held that "strictly speaking, no standard of review is being applied" but found that the correctness standard best reflects the Court's role (*Canadian Pacific Railway Company* at paras 52–56).

[16] The parties agree that the issues relating to the fettering of discretion and findings of fact and mixed fact and law are to be reviewed against a standard of reasonableness (*Liang v Canada (Citizenship and Immigration)*, 2017 FC 388 at paras 17–18; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 20–24).

V. Analysis

A. *Did the RAD's application of the Guide without providing notice to the applicants breach their procedural fairness rights?*

[17] The applicants submit that in considering a Guide that came into effect after they had filed their appeal without providing notice to them, the RAD breached their right to know the case to be met and to respond. I disagree.

[18] The Guide in issue was identified as a jurisprudential guide on July 18, 2017. It is based upon a RAD decision that addresses the issue of an individual's ability to leave China using their own passport when they are being sought by Chinese authorities and in particular the Chinese government's Golden Shield system (RAD TB6-11632, Leonard Favreau, November 30, 2016).

[19] Paragraph 159(1)(h) of the IRPA provides that the Chairperson of the Immigration and Refugee Board [IRB] may identify decisions of the Board as jurisprudential guides. Part 9 of the IRB's *Policy on the Use of Jurisprudential Guides* addresses the effect of identifying a decision as a jurisprudential guide, stating the following:

> The identification of a decision as a jurisprudential guide will be communicated to the public. The selected decision and reasons will be released in both English and French, and, where applicable,

> identifying information removed in order to maintain the privacy of the person concerned. Parties and their counsel will therefore be expected to know which decisions have been identified as jurisprudential guides.
>
> At the time that the Chairperson identifies a decision as a jurisprudential guide, the Chairperson will also issue a statement setting out the scope of the jurisprudential guide.
>
> Members are expected to follow the reasoning in a decision identified as a jurisprudential guide to the extent set out in the accompanying statement, unless there is reason not to do so, where the facts underlying the decision are sufficiently close to those in the case being decided to justify the application of the reasoning in the jurisprudential guide.
>
> A member must explain in his or her reasoning why he or she is not adopting the reasoning that is set out in a jurisprudential guide when, based on the facts of the case, he or she would otherwise be expected to follow the jurisprudential guide. [Emphasis in original]

[20] Justice Sébastien Grammond recently considered the sources of and justification for jurisprudential guides in *Singh v Canada (Citizenship and Immigration)*, 2018 FC 561 [*Singh*]. Justice Grammond noted that the IRPA provides for the adjudication of a large number of claims. The Chairperson's ability to issue guidelines coupled with the policy expectation that decision makers will follow those guidelines or explain why not seeks to promote the important objective of consistency in the treatment of similar cases. The use of jurisprudential guides is analogous to the application of precedent by the courts (*Singh* at paras 4–6).

[21] The IRB policy provides that a jurisprudential guide "will be communicated to the public" and that "[p]arties and their counsel will therefore be expected to know which decisions have been identified as jurisprudential guides." The applicants do not suggest the Guide was not communicated in accordance with the IRB policy; however, they argue that the duty to act fairly,

in the absence of a specific statutory provision, requires that notice nonetheless be given. They rely on the decision of the Supreme Court of Canada in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 [*Charkaoui*], to argue that a fair hearing includes the right of the affected person to be informed of the case against them.

[22] *Charkaoui* addressed the issuance of certificates of inadmissibility based on secret information. This circumstance is readily distinguishable from the situation in this case. Here the record indicates the Guide was released to the public and that the applicants and their counsel had access to it prior to the finalization of their submissions to the RAD.

[23] The applicants further argue that the RAD's consideration of the Guide raised a new issue or amounted to a situation where the RAD acted on its own initiative without notice. A genuinely new issue is one that is "legally and factually distinct from the grounds of appeal raised by the parties" (*R v Mian*, 2014 SCC 54 at para 30, [2014] 2 SCR 689). I am unable to conclude that a new issue arose or the RAD acted on its own initiative. The issues raised and addressed in the Guide were not new or unknown to the applicants. Rather, the applicants' ability to exit China while being sought by the PSB was identified as being in issue on appeal to the RAD. Nor was the RAD acting on its own initiative in considering the Guide. Instead, the RAD was implementing the IRB's stated policy of addressing jurisprudential guidance in furtherance of the objective of promoting consistency in the treatment of similar cases before the IRB.

[24] The applicants also take issue with the RAD having considered this Court's recent decision in *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 [*Huang*]. They argue

that *Huang* should have been brought to their attention as it was released after their submissions were made to the RAD.

[25] The RAD referenced *Huang* for the purpose of noting that it outlined case law relating to a claimant's ability to leave China. *Huang* summarized arguments contradictory to the conclusion contained in the Guide and was therefore favourable to the applicants' position. The RAD relied on *Huang* solely to set out the key points identified in prior jurisprudence—not to support any of its conclusions. In the circumstances, I am unable to conclude that the failure to bring *Huang* to the applicants' attention amounted to a breach of fairness.

[26] In summary, the issue of exit controls from China and the Golden Shield project was expressly addressed by the RPD and in turn was one of the issues raised on appeal to the RAD. Contrary to the position advanced by the applicants, the RAD's consideration of the Guide and its reference to the *Huang* decision did not breach the applicants' procedural fairness rights.

B. *In applying the Guide, did the RAD fetter its discretion and fail to assess the facts specific to the applicants' claim?*

(1) Fettering of discretion

[27] The applicants argue that jurisprudential guides are meant to guide a decision maker but do not relieve the decision maker of the obligation to assess the circumstances of each case. They submit that in relying on the Guide, the RAD unreasonably fettered its discretion by not considering the circumstances of the case before it. I am not convinced.

[28] A review of the RAD's decision as it relates to the applicants' exit from China demonstrates that the RAD considered the full record before it and in doing so reviewed the audio recording of the hearing before the RPD. The RAD decision then addresses the applicants' arguments on the appeal. The RAD notes that the applicants' narrative around their exit from China lacked detail in respect of the role of the smuggler and that evidence relating to the reported bribing of officials was "a very general statement." The RAD then concludes "the preponderance of the documentary evidence contained in the record indicates that it is not possible for a person who is wanted by authorities to exit China."

[29] After reaching its own conclusion, the RAD then turns to the Guide but in doing so notes that its finding is "supported" by the Guide. The RAD's reliance on the Guide as supportive of a conclusion reached after the RAD engaged in its own consideration of the record, the submissions, and the documentary evidence simply is not consistent with the applicants' position that the RAD fettered its discretion in applying the Guide. It did not.

(2) Assessing the facts

[30] The applicants argue that the RAD erred in its consideration and assessment of the subpoena and that this error undermines the reasonableness of the RAD's decision. I agree.

[31] In concluding the subpoena was fraudulent, the RAD failed to engage in any analysis of the document itself. It is not enough for a decision maker to note a document is "simple" or that it could be "produced using basic word processing techniques" or to note a general statement in the documentary evidence to the effect that fraudulent documents are available. This evidence

might bolster a conclusion of inauthenticity, but the conclusion itself must be based on something more. Here it is not.

[32] The respondent argues that the authenticity of the subpoena was not dispositive, the determinative issue being credibility. I disagree. It is clear that the RAD's finding that the subpoena was fraudulent impacted upon the RAD's overall assessment of the credibility of the applicants' claim.

[33] The applicants also address the RAD's finding that the document in issue was not a coercive criminal summons but rather a subpoena requiring appearance as a witness only. They do not dispute the RAD's conclusion that the document is probably a subpoena but argue this finding required the RAD to consider whether a subpoena seeking the attendance of a witness would have been captured in the Golden Shield program. They point to the documentary evidence that indicates only those undergoing criminal punishment or who are suspects or defendants in criminal cases are captured.

[34] In light of my conclusion that the RAD unreasonably found the subpoena to be fraudulent, the RAD also erred in failing to consider whether persons named in a subpoena, as opposed to persons named in a summons to appear on criminal charges, would be entered into the Golden Shield program.

[35] I am also of the opinion that the RAD erred in its treatment of the letters submitted in support of the *sur place* claim.

[36] The RAD assigned the letters little weight, citing two concerns. First, the RAD noted that the authors had failed to explain what makes the applicants Falun Gong practitioners. In effect, the RAD's concern focused on what the letters did not say.

[37] The jurisprudence is clear that a decision maker is required to address what the evidence *does* say, rather than what it does not (*Sitnikova v Canada (Citizenship and Immigration)*, 2016 FC 464 at paras 22–24). Here, the letters say that the authors are Falun Gong practitioners who have practiced with the applicants, and in one case the author had studied Fa with the applicants. The RAD erred in failing to consider what was said and then assessing the probative value and weight to be given the letters on that basis.

[38] The RAD also discounted the evidence because the authors failed to set out their qualifications. In this regard, I note and agree with the applicants' submissions that the letters were not offered as expert evidence and that it is unclear what kind of qualifications the RAD was looking for. If the RAD doubted the authenticity of the letters, it was open to it to explain why or to take steps to verify the authenticity (*Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 at para 52; *Downer v Canada (Immigration, Refugees, and Citizenship)*, 2018 FC 45 at para 63). It did neither. The RAD's treatment of the letters was unreasonable.

VI. Conclusion

[39] The application is granted. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-1649-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is returned for redetermination by a different decision maker; and

3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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