

Federal Court



Cour fédérale

Date: 20190226

Docket: IMM-3445-18

Citation: 2019 FC 229

Ottawa, Ontario, February 26, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

YU LI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for a decision from the Immigration and Refugee Board, Refugee Protection Division [RPD] refusing a refugee application pursuant to sections 96 and 97(1) of the *IRPA*.

II. Background

[2] The Applicant, Yu Li, is a 46 year old woman who fears persecution in China for her alleged practice of Falun Gong. The Applicant alleges that she began practicing Falun Gong in 2010 and that this practice has helped her cure her anemia.

[3] The Applicant claims that she first began practicing Falun Gong in her home, before joining a Falun Gong practice group in June 2010. This practice group met in a storage room.

[4] The Applicant alleges that in April 2012, the Public Security Bureau [PSB] raided her practice group. The Applicant hid at her cousin's house, and she was informed by her husband that the PSB was looking for her. The Applicant claims that the PSB came to her house four times, and on one occasion showed her husband a warrant for her arrest. The Applicant also alleges that two people from her practice group were arrested by the PSB during the raid.

[5] It was during this time that the Applicant decided to leave China for Canada, where she continues to practice Falun Gong.

[6] The Applicant submitted a refugee application under sections 96 and 97(1) of the *IRPA* which was reviewed by the RPD and dismissed on July 4, 2018.

A. *Decision under Review*

[7] The RPD found that the Applicant is a citizen of China. The dispositive issue in this claim was the lack of credible evidence to support the Applicant's Falun Gong claim. The RPD took issue with a number of claims and the evidence provided by the Applicant, finding in particular that:

- i) The Applicant was "setting the stage" to make a claim in North America by travelling to Singapore and Japan in 2009 and 2011, respectively. As well, the Applicant was not forthcoming regarding two of her three rejected visa applications to the United States;
- ii) The Applicant did not provide a satisfactory explanation for waiting four months before leaving China, particularly since, unlike the United States, Canada does not require the Applicant to leave hiding for a personal interview;
- iii) There were issues with the medical booklet provided by the Applicant, specifically that it only lists two entries before the anemia entries, it has limited information, there are no follow-up entries once her condition began to improve. Additionally, it was discounted on the basis that fraudulent documents are easy to access in China, and the Applicant had previously demonstrated a willingness to use fraudulent documents in her visa application;
- iv) The Applicant's testimony and Personal Information Form narrative were inconsistent regarding the time when she began to notice an improvement in her condition (i.e. after starting Falun Gong versus before starting Falun Gong);
- v) The Applicant's testimony was not consistent about when she started learning Zhuan Falun;

- vi) The Applicant provided vague answers about the storage room used for group practice meetings, and it was implausible that the group did not question someone watching them enter through the front door one by one;
- vii) The RPD drew a negative inference from the fact that the Applicant was emotionless when discussing the PSB raid on the practice group. Additionally, it was unlikely that the practice group did not have a plan in case the PSB raided the meeting but would simply follow the leader's instructions;
- viii) The RPD drew a negative inference from the Applicant's failure to provide any documentary evidence of her arrest warrant, and found it implausible that the Applicant would not get in touch with her friends in her Falun Gong practice group to find out what happened to them; and
- ix) The RPD drew a negative inference from the lack of evidence showing that the PSB searched her parents' or other relatives' homes, and that none of her family was harmed due to her practice in Falun Gong. The Applicant suggested before the RPD that her son was unable to attend university because of her practice, but did not provide any evidence to this effect.

[8] In addition to the issue raised above, the RPD also found that it was not likely that the Applicant was wanted by the PSB because she left China on her own passport. The RPD reasoned that if she were wanted by the PSB, her information would have been available to the exit authorities as part of the Golden Shield Project.

[9] Finally, the RPD raised issues with the evidence the Applicant provided to support her continued practice of Falun Gong in Canada. These issues included: undated photographs, not calling as witnesses the authors of the letters verifying her Falun Gong practice, and the Applicant's uneasiness in sharing her Falun Gong knowledge despite having claimed to be a practitioner for the last seven years.

[10] Based on these credibility issues, the RPD rejected the Applicant's refugee and *sur place* claims.

III. Issue

[11] The issue is whether the RPD's credibility findings are unreasonable because they are based on speculation, are overly microscopic, or are lacking evidentiary support.

IV. Standard of Review

[12] The parties agree that a reasonableness standard applies in this case.

V. Analysis

A. *Whether the RPD's credibility findings are unreasonable because they are based on speculation, are overly microscopic, or are lacking evidentiary support*

[13] The Applicant has raised 10 different instances in the decision which she alleges are errors in the RPD's decision as they fall into either speculation, an overly microscopic analysis, or a finding not based on the evidence.

[14] The Applicant argues that all of the findings made by the RPD are plausibility findings. The Respondent argues that the findings are not implausibility findings, but rather findings based on demeanor, lack of detail, lack of forthrightness, inability to answer specific questions, and the RPD's expertise.

[15] The findings raised by the Applicant are a mixture of plausibility and other findings (such as findings based on inconsistencies and omissions and findings based on demeanour). The following principles apply:

- i) The RPD is in the best position to assess credibility and is entitled to significant deference from the Court in this regard. The Court cannot simply substitute its credibility assessment for that of the RPD even if it might have reached a different conclusion;
- ii) The Court must consider that other reasonable conclusions might have been possible on the facts, but this does not, in itself, render the RPD's decision unreasonable; and
- iii) Less deference is due in relation to plausibility findings; nevertheless the RPD can make reasonable findings based upon implausibilities, common sense, and rationality, and may reject evidence that is not consistent with the probabilities affecting the case as a whole.

(1) Speculation

[16] The Applicant argues that the following findings made by the RPD were speculative: (1) that the Applicant's previous trips to Singapore and Japan were to set the stage for her visa application in North America; (2) that a Falun Gong practice group would have a plan in case the PSB raided the meeting, and would not have simply gone out the back door; (3) that the Applicant would have followed up with her doctor once she started to feel better; (4) that the

Applicant would know what the storage room was usually used for; and (5) that the Applicant would know what happened to her fellow practitioners and would have their contact information. The Applicant argues that there was no evidence before the RPD upon which to make such findings. The Respondent argues that it was open to the RPD to make these findings, as they are credibility findings which are not improper.

[17] In *Valtchev v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 776 at paragraph 7, this Court explained that a decision maker can make findings based on plausibility; however, these findings are only permissible in the clearest of cases. The Court explained that the clearest of cases will be circumstances where “the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant.”

[18] While a decision maker is reasonable to draw logical inferences based on clear and non-speculative evidence, he or she may not engage in speculation and render conjectural conclusions.

[19] With the exception of the statement regarding the Falun Gong practice group having a plan to deal with a PSB raid, I find that the remaining findings are based on speculation:

- i) The finding regarding the Applicant’s trips to Singapore and Japan is based on speculation. The RPD insinuated that these trips were done in an effort to “set the stage” for her visa applications. The RPD did not rely on any evidence to come to this

conclusion except that “[i]t is well known that a record of previous travel is helpful when applying for a US visa”;

- ii) That the Applicant would go for a follow up appointment with her doctor is not implausible. Many people do not follow up with doctors once they start feeling better. As the Applicant alleged that none of the medication was helping her and that she found that what did help was an illegal religious practice, it is plausible that the Applicant would not continue seeking medical appointments; similarly, the contents of the medical booklet were reasonably explained by the Applicant;
- iii) It is also plausible that the Applicant would not know the regular use of the storage facility. The Applicant visited this facility for Falun Gong group practices. There was no reason for the Applicant to know the specific use for the storage facility;
- iv) The RPD also questioned the Applicant’s allegation that she did not have any contact information for her fellow practitioners and that she did not know what happened to them. Considering that the Applicant was in hiding after the raid, which the RPD does not appear to dispute, it is plausible and even likely that the Applicant would not be in contact with her fellow practitioners. On the point that the Applicant did not have any contact information for her fellow practitioners, this is also plausible as they are engaging in an illegal activity, and may want as few links to one another as possible, in case someone is arrested by the PSB.

[20] In conclusion, the RPD engaged in speculation and made improper implausibility findings. These findings relate directly to an unreasonable credibility assessment, including with respect to the Applicant’s *sur place* claim.

[21] The RPD's speculation went beyond a rigorous approach and resulted in an unreasonable decision.

(2) Overly Microscopic Analysis

[22] The Applicant argues that the following statements by the RPD were determined using an overly microscopic analysis: (1) the lack of forthrightness from the Applicant during her testimony regarding two previous US visa refusals; (2) the inconsistent answers regarding when her anemia began to improve; (3) the omission from the Applicant's PIF that her friend taught her Zhuan Falun at home; and (4) the Applicant's emotionless recounting of her escape from the PSB raid, and that the narrative of her escape was "sketchy" as she did not know what happened to her fellow practitioners. The Applicant argues that she was forthright, that the inconsistency in her answers on anemia was due to misunderstanding the RPD's question, and that the RPD should have considered the six year gap between her time in China and the hearing date.

[23] The Respondent argues that (1) the RPD is permitted to draw an adverse inference from the fact that Applicant did not initially disclose the other previous US visa refusals; (2) there is no evidence that the Applicant misunderstood the question, there is only a statement from counsel to this effect; (3) it was reasonable for the RPD to find that the omission from the Applicant's PIF was significant; and (4) it was open to the RPD to find that the Applicant would know what happened to her fellow practitioners, and that the finding regarding the Applicant's testimony being emotionless is based on demeanour and open for the RPD to assess.

[24] While the RPD made a number of findings based on what appears to be pure speculation, the overall RPD assessment is not overly microscopic.

(3) Lacking Evidentiary Support

[25] The Applicant argues that (1) the RPD's statement, that it is unusual that the medical booklet only contains two entries not relating to Applicant's anemia diagnosis, lacks supporting evidence; and (2) the finding regarding the lack of reprisal against the Applicant's family members is out of step with the documentary evidence. The Applicant argues that the RPD did not ask the Applicant if she has any other medical booklets (in her memorandum, the Applicant says that the RPD did ask this question, but based on context, this appears to be a typo). As well, the Applicant argues that the documentary evidence does not state that in every case there will be a reprisal against the family members.

[26] The Respondent argues that (1) the Applicant is raising an improper and purely theoretical argument as to the existence of other medical books without actually showing that such books exist; and (2) the RPD reviewed documentary evidence when reviewing the issue of reprisal against family members, and made its determination based on the lack of reliable evidence showing any reprisal.

[27] Regarding the medical booklet, the RPD took issue with the lack of evidence showing the Applicant's medical history prior to her anemia diagnosis. It is reasonable that the Applicant would only provide the medical evidence discussing her anemia, as this was the only medical ailment relevant to her claim. The RPD's review of the medical booklet raised other concerns

aside from the short medical history, such as the limited information contained in the document and the access to fraudulent documents in China. However, based on the cumulative assessment of the medical booklet, which includes the unreasonable expectation of the medical history evidence and the missing follow-up appointments (discussed above), the RPD's conclusion on the medical booklet goes to the RPD's assessment of the Applicant's credibility and is unreasonable.

[28] On the issue of the documentary evidence of PSB reprisals against Falun Gong practitioners' family members, the RPD did not conclude that they happen in every case, only that reprisals against family members *generally* happen. As well, this was not the only evidence the RPD reviewed on this point. The RPD also noted the lack of evidence to support the Applicant's claim that her son was discriminated against because of her Falun Gong practice when he was applying for university. The RPD was reasonable in its assessment of this issue.

(4) Departing China on Own Passport and Falun Gong Identity

[29] The Applicant argues that as the RPD's credibility findings were unreasonable, the findings on the issue of the Applicant's exit from China on her own passport and identity as a practitioner of Falun Gong must also be unreasonable, as they are based on the credibility findings. The Respondent agrees that the RPD's finding on the Applicant's identity as a Falun Gong practitioner is based on the credibility findings. Therefore, as I found several credibility findings to be improper implausibility findings, the RPD's finding regarding the Applicant's identity as a Falun Gong practitioner is also unreasonable.

[30] The issue of the Applicant leaving China on her own passport was reasonably assessed by the RPD. This issue was not based on any of the above credibility findings but rather on documentary evidence that discussed the Golden Shield Project, a nationwide public security network. This evidence was used in conjunction with the negative credibility findings to establish that the Applicant was not a Falun Gong practitioner and was not pursued by the PSB, but the evidence itself was not dependent on the credibility findings.

[31] However, given the RPD's unreasonable implausibility findings, which “seeped into” the Applicant’s overall credibility and her claim to be a Falun Gong practitioner, this application is allowed.

JUDGMENT in IMM-3445-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a different officer for reconsideration;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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