

Federal Court



Cour fédérale

Date: 20230620

Docket: IMM-8804-21

Citation: 2023 FC 866

Ottawa, Ontario, June 20, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

XIACHI WANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD], dated October 25, 2021 [the Decision]. In the Decision, the RAD upheld the decision of the Refugee Protection Division [RPD], which found that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is dismissed, because the Applicant's arguments do not undermine the reasonableness of the Decision.

II. Background

[3] The Applicant is a Chinese citizen who claims to fear persecution by Chinese authorities because he is a Falun Gong practitioner.

[4] The Applicant claims that he developed back pain from his occupation in farming sea products. After traditional and Western treatments for his pain did not help, the Applicant claims that he was introduced to Falun Gong by a friend in June 2017. Although he was concerned about the danger in practicing Falun Gong in China, the Applicant claims that he was willing to try it to relieve his discomfort.

[5] In July 2017, the Applicant began learning Falun Gong and started practicing both at home and with groups. He claims that on June 3, 2018, the Chinese Public Security Bureau [PSB] raided a group practice session but that he was able to escape to his aunt's home. He states that a couple days later the PSB attended his home, where his wife and two children remained. After the Applicant learned that his friend and another practitioner were arrested and that the PSB had attended his home a second time in search for him, the Applicant was put in contact with a smuggler who assisted him in escaping China.

[6] The Applicant arrived in Canada on August 21, 2018, and made a refugee claim two days later. On April 21, 2021, the RPD heard the Applicant's claim and rejected it on the basis of

credibility, finding that he had not established that he was a genuine Falun Gong practitioner in China or in Canada. His appeal before the RAD was heard on October 5, 2021.

III. Decision under Review

[7] The determinative issue before the RAD was the Applicant's credibility. While the RPD made six negative credibility findings, only three were challenged on appeal to the RAD.

[8] The first of the challenged credibility findings related to the RPD drawing a negative inference based on the Applicant's failure to amend his Basis of Claim [BOC] form. At his RPD hearing, the Applicant testified that the PSB had continued to go to his home looking for him and had done so five or six times since he had left China. The RPD noted that, despite amending his BOC form, he failed to include in this amendment information regarding the continued activities of the PSB. During his RPD hearing, he was asked about this, and he was silent and did not respond to the question. He was also asked why he did not obtain a letter from his wife or children regarding the PSB visits. The Applicant responded that his wife is illiterate and did not answer as to why his children could not help his wife in writing a letter.

[9] Before the RAD, the Applicant argued that the RPD erred in finding that he should have amended his BOC form to include the recent PSB attendances. He relied on this Court's decision in *Zhang v Canada (Citizenship and Immigration)*, 2007 FC 665 [*Zhang*], but the RAD distinguished *Zhang* from the present case. The RAD noted that in *Zhang* the applicant's explanation for not amending his Personal Information Form (the predecessor to the BOC form) was that he thought that he could discuss recent events at the hearing, which the Federal Court

found to be reasonable. In the present case, the RAD noted that, at the Applicant's RPD hearing when the RPD member pointed out to him that he had amended his BOC form but failed to amend it to reflect the PSB visits since he left China, the Applicant was silent and provided no explanation. As such, the RAD agreed with the RPD that the continued interest of the PSB was significant and that the RPD did not err in drawing an adverse inference from the Applicant's failure to amend his BOC form to include these details.

[10] Next, the Applicant challenged the adverse inference drawn by the RPD from the Applicant's failure to produce a summons. The Applicant submitted that his credibility could not be affected by the absence of a summons, as the evidence indicated that the PSB exercises authority to issue summonses in different ways. The Applicant relied on jurisprudence from this Court that cautions decision-makers against drawing adverse credibility inferences on the basis of expectations about what Chinese authorities are likely to do or assumptions that law enforcement will be consistently uniform. This jurisprudence held that, when the evidence provides that a summons may be issued, it is not reasonable to determine that the failure to present a summons is so unlikely as to damage an applicant's credibility.

[11] The RAD disagreed with the Applicant and found that the RPD did not err in drawing an adverse inference from the absence of a summons in this case. The RAD relied on jurisprudence in which this Court held that when a refugee claimant testifies that the PSB is relentlessly pursuing them, it may be reasonable to expect a summons or some other kind of documentation. Further, while the lack of a summons is not determinative, it can be one of many elements leading to a negative credibility findings. Given the fact that the PSB had pursued the Applicant

for more than two years, the perception of the Falun Gong as a cult, and the arrest of two of the Applicant's fellow practitioners, the RAD was of the view that the RPD did not err in drawing an adverse inference from the absence of a summons.

[12] Finally, the Applicant challenged the RPD's finding that he was not a genuine Falun Gong practitioner. In rejecting the Applicant's submissions, the RAD noted that Falun Gong is a knowledge-based practice. As such, the RAD drew a negative inference regarding the Applicant being a genuine Falun Gong practitioner from his lack of knowledge of basic Falun Gong principles. In addition to his lack of knowledge, the RAD took into account the credibility concerns regarding the underlying basis of claim and the fact that, despite his freedom to practice in Canada, the Applicant did so only once a week. Ultimately, while the RAD agreed with the Applicant that a low standard applies to refugee claimants' demonstration of religious knowledge as a means of proving religious identity, the RAD concluded that the Applicant's knowledge failed to meet this standard.

[13] As such, the RAD confirmed the decision of the RPD that the Applicant was neither a Convention refugee nor a person in need of protection.

IV. Issues and Standard of Review

[14] The sole issue raised in the Applicant's Memorandum of Law and Argument is whether the RAD erred in its assessment of the Applicant's credibility. His Memorandum argues that the RAD erred in its credibility conclusions related to: (a) the Applicant's failure to amend his BOC

to include recent visits by the PSB; (b) the absence of a summons or arrest warrant; and (c) the Applicant's lack of knowledge of Falun Gong principles.

[15] The parties agree (and I concur) that the standard of review applicable to this issue is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

[16] At the hearing of this application, the Applicant's counsel advanced arguments related to an additional issue – whether, in relation to the Applicant's *sur place* claim, the RAD erred in concluding that the Applicant was required to show genuine faith in connection with his Falun Gong practice in Canada in order to be at risk following a return to China.

[17] The Respondent took the position at the hearing that the Applicant was precluded from raising this issue, because he had not raised it in his appeal to the RAD or in his Memorandum of Fact and Law in this application for judicial review. As such, before turning to adjudication of the credibility issues, I will address the preliminary question of whether the Court should adjudicate the issue the Applicant raised at the hearing.

V. Analysis

A. *Should the Court adjudicate the issue raised by the Applicant at the hearing of this application?*

[18] As noted above, the issue raised by the Applicant for the first time at the hearing of this application was whether, in relation to the Applicant's *sur place* claim, the RAD erred in concluding that the Applicant was required to show genuine faith in connection with his Falun

Gong practice in Canada in order to be at risk following a return to China. In summary, the Applicant wishes the Court to consider an argument that the genuineness of his belief in Falun Gong as a religious practice is not particularly germane to whether that practice would place him at risk in China. Rather, he submits, it is the physical practice of Falun Gong in China that would place him at risk of persecution by Chinese authorities, who would not particularly care about the genuineness of his faith.

[19] First, the Respondent submits that it would be unfair to expect the Respondent to address an argument that the Applicant raised for the first time at the hearing of this application. The Applicant responds that he has raised this argument by way of reply to the Respondent's Further Memorandum of Argument, in which the Respondent submits that the RAD did not err in its analysis of the Applicant's lack of knowledge of Falun Gong. The Applicant submits that he should be afforded the opportunity to advance this argument, as a matter of hearing fairness, because the Respondent did not file a Memorandum of Argument at the leave stage of this application. As a result, the Applicant submits that the oral hearing represents the first opportunity for the Applicant to reply to the Respondent's position in this application.

[20] The Applicant's hearing fairness submission raises the question whether his new argument represents appropriate reply. However, it is not necessary for the Court to reach a conclusion on this question, because I agree with the Respondent's second argument that the Applicant is precluded from raising this new issue as it was not raised in the appeal before the RAD. It is clear from the Applicant's Memorandum of Argument before the RAD that his appellate submissions, related to the genuineness of his faith, were limited to an argument that

the RPD erred in its treatment of his religious knowledge in assessing the genuineness of his faith. The Applicant did not ask the RAD to consider an argument that the RPD had erred in requiring genuine faith to support his claim.

[21] The Applicant relies on *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], as authority for his ability to raise the new argument on judicial review, even though it was not raised before the RAD. *Huruglica* explains that the RAD must apply the correctness standard in reviewing RPD decisions (at para 103). The Applicant submits that it would be inconsistent with the correctness standard for his application for judicial review to be limited to review of arguments that were raised before the RAD.

[22] I find no merit to the Applicant's position. As explained in *Marri v Canada (Citizenship and Immigration)*, 2022 FC 825 at paragraph 22, the RAD's role is to conduct its own analysis of the record to decide whether the RPD erred in the manner alleged by the appellant on appeal (my emphasis). Similarly, *Kabba v Canada (Citizenship and Immigration)*, 2023 FC 117 has expressly concluded that a decision of the RAD cannot be impugned by the Court on the basis of an issue which the applicant did not challenge on appeal (at para 14).

[23] As such, the Court will not adjudicate the issue raised by the Applicant for the first time at the hearing of this application. I will therefore move to the arguments raised in the Applicant's Memorandum of Law and Argument .

B. *Applicant's failure to amend his BOC to include recent visits by the PSB*

[24] The RAD found that the RPD did not err in drawing an adverse inference from the Applicant's failure to amend his BOC to include the repeated visits to his home by the PSB, to which he testified at the hearing.

[25] In support of his position that the RAD erred in this finding, the Applicant refers the Court to the decision in *Zhang*, which found analysis of this sort to be a reviewable error. As explained earlier in these Reasons, the Applicant raised *Zhang* before the RAD, and the RAD found the case distinguishable on the basis that the applicant in that case had testified that he thought he could provide at the hearing the information that was missing from his BOC. The Applicant acknowledges this factual difference but argues that the RAD nevertheless erred in distinguishing *Zhang*.

[26] I find no reviewable error arising from this argument. As the Applicant concedes, the RAD noted that the applicant in *Zhang* provided an explanation as to why he did not amend his BOC and contrasted those circumstances with the case at hand, where the RPD asked for such an explanation and the Applicant failed to provide one. The RAD also observed that the continued interest of the PSB was a significant fact and that the Applicant was represented by experienced counsel. Moreover, the law is clear that a claimant's failure to include in their BOC important facts and details of their claim can affect the claimant's credibility (see, *e.g.*, *Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at para 18).

C. *Absence of a summons or arrest warrant*

[27] The RAD found that the RPD did not err in drawing an adverse inference from the absence of a summons issued by the PSB to the Applicant. The Applicant argues that the RAD erred in this finding because country condition evidence indicated only that a summons may be served by the relevant authorities on suspected offenders, not that this would necessarily occur. The Applicant also relies on this Court's jurisprudence cautioning decision-makers against drawing adverse credibility inferences on the basis of expectations as to what Chinese authorities are likely to do or an assumption that their law enforcement practices will be consistently uniform (see *Wang v Canada (Citizenship and Immigration)*, 2018 FC 1124 [*Wang*] at paras 39-43).

[28] The RAD considered the Applicant's argument and supporting jurisprudence but relied on *Huang v Canada (Citizenship and Immigration)*, 2019 FC 148 [*Huang*], which considered *Wang* and noted that the jurisprudence is split on whether such a finding is reasonable. *Huang* concluded that it may be reasonable to expect a corroborating summons or similar documentation where the claimant has testified that they are being relentlessly pursued by the PSB, although the lack of such documentation should not be treated as determinative (at paras 28-31).

[29] Consistent with the reasoning in *Huang*, the RAD did not find the absence of a summons to be determinative, but it found that it was reasonable for the RPD to draw an adverse inference from the absence of a summons, given that the allegations included the arrest of two members of the Applicant's group and that the PSB had been pursuing the Applicant for more than two years. I find nothing unreasonable in this analysis.

D. *Applicant's lack of knowledge of Falun Gong principles*

[30] The RAD also drew an adverse inference (as had the RPD), as to whether the Applicant was a genuine Falun Gong practitioner, from his lack of knowledge of basic Falun Gong principles. The Applicant submits that the RAD erred in this conclusion. The Applicant relies on jurisprudence that emphasizes the very low standard that refugee claimants must meet to demonstrate religious knowledge as a requirement for proving religious identity (see *Lin v Canada (Citizenship and Immigration)*, 2012 FC 288 [*Lin*] at paras 59 and 61).

[31] I accept the principle identified in *Lin* on which the Applicant relies. However, the RAD recognized this principle and found that the Applicant's knowledge did not meet even the low standard. The RAD reviewed the Applicant's testimony at the RPD hearing and concluded that the Applicant displayed an extremely limited knowledge of Falun Gong. I agree with the Respondent that this portion of the RAD's analysis demonstrates no reviewable error.

VI. Conclusion

[32] In conclusion, I find that the Decision is reasonable and that this application for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-8804-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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