Federal Court  Cour fédérale

Date: 20140728

Docket: IMM-1956-13

Citation: 2014 FC 749

Ottawa, Ontario, July 28, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HONGZHEN CHEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated February 12, 2013 [Decision], which

refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under ss. 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 57-year-old citizen of China, who came to Canada in March 2011 and applied for refugee protection based on a fear of persecution as a practitioner of Falun Gong.

[3] The Applicant says she worked for more than 30 years at a post office in Tianjin, China, but suffered from chronic arthritis. The condition became worse, and by December 2009 she could barely walk. A friend introduced her to the practice of Falun Gong, believing it would help. The Applicant says she knew Falun Gong was banned in China, but began practising secretly at home. She says she felt much better after two months, and was later introduced to a secret practice group by her friend.

[4] The Applicant claims that in January 2011, her friend's husband called to say his wife had been arrested, and warned the Applicant to be careful. The Applicant and her husband agreed she should go to stay with a relative in the countryside and look for a smuggler (or "snakehead") to help her get out of the country. She says she feared that the Public Security Bureau [PSB] would come looking for her and arrest her as well. She left China with the help of a smuggler, arrived in Canada on March 18, 2011, and filed her refugee claim on March 29, 2011.

[5] The Applicant stated in the narrative portion of her Personal Information Form [PIF] that the PSB had been to her home 6 times since her departure. She testified before the RPD that on the fifth such visit the PSB brought a warrant for her arrest, which they showed to her husband. The Applicant also stated in her PIF that her husband spoke to her friend's husband in February 2012, and learned that her friend was still in jail and had been sentenced to three years.

DECISION UNDER REVIEW

[6] The RPD found that the Applicant was neither a Convention refugee nor a person in need of protection as described in s. 97 of the Act. Credibility was the determinative issue.

[7] On the issue of nexus to a Convention ground of refugee protection, the Board found that practising Falun Gong falls within the definition of membership in a particular social group, and analyzed the claim under both ss. 96 and 97 of the Act.

[8] With respect to the Applicant's credibility, the Board acknowledged that testimony given under oath is presumed to be true unless there is a valid reason to doubt its truthfulness (citing *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at 305 (FCA)), but found that "the real test of the truth of a story of a witness is that it be in harmony with the preponderance of probabilities, which a practical and informed person would readily recognize as reasonable in that place and in those circumstances" (citing *Faryna v Chorny*, [1952] 2 DLR 354 at 357(BCCA)). The Board found that it could not be satisfied that "the evidence is credible or trustworthy, unless satisfied that it is probably so, not just possibly so"

(quoting *Orelien v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 592 at 605 (FCA)).

[9] The RPD observed that the Applicant learned of her friend's arrest on January 5, 2011 and left the country on March 18, 2011, but the PSB first went to her house on April 16, 2011. The Board found that it was unreasonable that the Applicant would leave her country before the PSB began to look for her, and that this raised credibility concerns regarding her allegations. The RPD found that there was no evidence to indicate that the PSB was looking for the Applicant at the time she went to stay in the countryside, or at the time she left the country.

[10] The RPD also found that it was not reasonable for the PSB to come looking for the Applicant repeatedly at her home when they would have had information available to indicate that she was out of the country and had not returned. The Board noted that the Applicant had left China using her own passport, and found that she would have had no difficulty doing so since the PSB was not looking for her at the time. However, upon her exit, the Board found, she would have been recorded in a national database as having left the country. It cited information in the IRB's Responses to Information Requests (RIRs, CHN103133.E, China (July 2009)) stating that the PSB has established a national policing database, referred to as the Golden Shield Project, which includes "criminal fugitive information" and "information on passports and exit and entry." While evidence submitted by the Applicant's counsel showed that China's policing system is very decentralized and there are problems with information sharing among PSB offices, this would not have prevented the PSB from knowing the Applicant had left the country:

> While the panel accepts counsel's submissions, it finds it difficult to understand why a large area, such as Tianjin, where the claimant

> lives, would not have access to information that would have been inputted into the Golden Shield computer programme at Beijing Airport where the claimant went through customs with her own passport. The programme would simply indicate that the claimant was out of the country and had not returned.

[11] The RPD also found that the absence of corroborating evidence gave rise to credibility concerns regarding the Applicant's allegations. Specifically, the Board noted that the Applicant did not provide a copy of the arrest warrant shown to her husband by the PSB on the fifth visit to her home. When asked why her husband did not request a copy, the Applicant replied that he was not aware of such procedures. In addition, the Board found that the Applicant had not presented sufficient reliable and trustworthy evidence to show that her friend was charged and imprisoned for three years.

[12] The fact that the Applicant's husband and son had not been subjected to punishment, despite the PSB visiting their home six times, raised credibility concerns about the Applicant's allegations. The Board cited documentary evidence (RIRs, CHN102560.E, China (11 July 2007)) stating that family members of Falun Gong practitioners are also subject to punishment, and found that it was reasonable to expect that the Applicant's family members would have been subjected to some form of punishment.

[13] The Board was satisfied that the Applicant had demonstrated a knowledge of Falun Gong at the hearing, but found that this did not demonstrate the credibility of her allegations. It found that she had not practised Falun Gong in China, and had adopted the practice in Canada only to buttress her refugee claim:

> [21] The panel questioned the claimant on her Falun Gong knowledge which was answered to the satisfaction of the panel. However, considering the panel's credibility concerns regarding the claimant's allegations, the panel finds that the claimant was not a Falun Gong practitioner in China. Therefore, the panel finds the claimant became a Falun Gong practitioner in Canada only to bolster her refugee claim.
>
> [22] Since the panel does not accept the claimant's allegations that she was a genuine Falun Gong practitioner in China, the panel finds the PSB are not seeking to arrest her. Further, the panel determines that the claimant is not a genuine Falun Gong practitioner in Canada. Therefore, the panel finds the claimant can safely return to her home in Tianjin, China.

[14] Based on these findings, the Board concluded that the Applicant is not a Convention refugee and is not a person in need of protection.

ISSUES

[15] The Applicant raises the following issues for the Court's consideration:

(a) Did the RPD err in law in its assessment of the Applicant's *sur place* claim?

(b) Did the RPD make unreasonable credibility findings that were not in accordance with the evidence?

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of

review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[17] In my view, the issues raised by the Applicant relate to the Board's interpretation and weighing of the evidence, including its conclusions about the Applicant's credibility. It is well established that the Board's conclusions on these matters are entitled to deference and a standard of reasonableness applies: *He v Canada (Minister of Citizenship and Immigration)*, 2010 FC 525 at paras 6-9; *Lawal v Canada (Minister of Citizenship and Immigration)*, 2010 FC 558 at para 11; *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (FCA) at para 4; *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773 at para 21; *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155 at para 9.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the

sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[19] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle

have a country of nationality, their country of former habitual residence, would subject them personally	a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENT

Applicant

Failure to properly analyze sur place claim or s. 97 risks

[20] The Applicant argues first that the Board erred in law in its assessment of her *sur place* claim, because it failed to consider the nature of her practice of Falun Gong in Canada or the genuineness of her faith in Canada. It also failed to consider her potential risk of cruel and unusual punishment in light of her perceived involvement in Falun Gong through her activities in Canada. The Applicant points to paragraphs 21 and 22 of the Decision, quoted above, as evidence of this.

[21] The Applicant notes that she showed an in-depth knowledge of Falun Gong and demonstrated one of the exercises at the hearing, to the satisfaction of the presiding Board member. She also testified to her ongoing practice of Falun Gong both publicly and in private. Despite this, the Board simply found that since she was not a genuine practitioner in China, she was not a genuine practitioner in Canada. No reasons were given for this assessment other than the Board's credibility concerns regarding the events in China. There was no assessment of whether the Applicant had become a genuine adherent in Canada.

[22] The Applicant notes that this Court has held that the Board is required to consider the Applicant's religious practice in Canada when assessing a *sur place* claim; it is insufficient and erroneous to rely on the fact that a person was not a religious practitioner in China to discount

the genuineness of their faith in Canada: *Jin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 595 at para 19 [*Jin*]; *Yin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 544 at para 90 [*Yin*]. The Applicant says it was erroneous for the Board to find that because her experience in China was not credible, everything in Canada was also false. She quotes Justice Zinn's analysis from *Huang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 205 at para 32 [*Huang*]:

> Even if the principal applicant was not a Christian in China, there is evidence that she attends a Christian church in Canada and participates in its activities. Perhaps, like Saul on the road to Damascus, she had a revelation and a spiritual awakening in Canada; perhaps not. However, in order to arrive at a decision as to the genuineness of her current beliefs some analysis must be made of the evidence and if her evidence is to be totally discounted, some justification must be provided for that decision. Here there is none. The Board merely states the conclusion it has reached and it is impossible for the Court, on the basis of the record, to ascertain why that conclusion was reached.

[23] The Applicant says the Board also erroneously imported the concept of "good faith" into the analysis, dismissing her Falun Gong practice in Canada as simply an attempt to "bolster" her refugee claim. In fact, the only consideration with respect to her *sur place* claim is whether her faith is genuine. The Applicant quotes Justice Blanchard's analysis in *Ejtehadian v Canada (Minister of Citizenship and Immigration)*, 2007 FC 158 at para 11:

> … In assessing the Applicant's risks of return, in the context of a *sur-place* claim, it is necessary to consider the credible evidence of his activities while in Canada, independently from his motives for conversion. Even if the Applicant's motives for conversion are not genuine, as found by the IRB here, the consequential imputation of apostasy to the Applicant by the authorities in Iran may nonetheless be sufficient to bring him within the scope of the convention definition. See *Ghasemian v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1591, 2003 FC 1266, at paragraphs 21-23, and *Ngongo c. Canada (M.C.I.)*, [1999] A.C.F. No 1627 (C.F.) (QL).

[24] The Applicant also says that the Board failed to assess her risks under s. 97 as a perceived Falun Gong practitioner. The documentary evidence before the Board shows that the Chinese government monitors Falun Gong practice groups abroad, and returning practitioners have been detained and imprisoned upon their return (see UK Border Agency, Country of Origin Information Report, China (15 November 2010), Applicant's Record at pp 193-94 [UK Border Agency Report]; *Toronto woman claims China spied on her*, CTV.ca (June 18, 2005), Applicant's Record at p. 122). The Court has previously observed that the country documentation shows that Falun Gong practitioners in Canada and elsewhere are monitored by Chinese government informants: *He v Canada (Minister of Citizenship and Immigration)*, 2009 FC 502. Regardless of its findings about her motives for joining Falun Gong, the Applicant says, the Board was required to determine whether her activities in Canada would create a risk if she were returned to China: *Hailu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 908 [*Hailu*].

[25] The Applicant says there was clear evidence before the Board that persons suspected of being Falun Gong adherents are subject to arrest, mistreatment and torture, and there have been numerous credible reports of organ harvesting from detained Falun Gong practitioners: see UK Border Agency Report, Applicant's Record at pp. 185-87, 189-90.

[26] Since the Board found that the Applicant is familiar with Falun Gong, and she testified that she continues to practise it, the Board should have considered whether she will face a risk of cruel and unusual treatment or punishment due to her perceived involvement in Falun Gong as a result of her public activities her in Canada.

Unreasonable credibility findings

[27] Second, the Applicant argues that the Board's credibility findings were unreasonable.

[28] The Board made unreasonable plausibility findings that were based on speculation and which disregarded the evidence, the Applicant says, and plausibility findings must be based on clear evidence, with a clear rationalization process that makes reference to any contrary evidence. Where the facts do not support the plausibility findings the Court should intervene, she argues, because the Court is just as capable as the Board of deciding whether a particular scenario might reasonably have occurred: S*antos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15 [*Santos*]; *Cao v Canada (Minister of Citizenship and Immigration)*, 2007 FC 819 at para 7. She adds that plausibility findings should be made only in the clearest of cases, where documentary evidence demonstrates that events could not have happened in the manner asserted: *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131 at paras 6-8, 2001 FCT 776 (TD) [*Valtchev*]; *Ilyas v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1270 at para 59 [*Ilyas*].

[29] The Board's finding that it was implausible that she would leave China before the PSB began to look for her is not reasonable, the Applicant argues, in light of her testimony that her friend was arrested on January 5, 2011 and the country documentation regarding the mistreatment of Falun Gong practitioners in detention. It was reasonable for the Applicant to be scared and want to leave China as soon as possible before the PSB found and arrested her too. The Board was simply substituting its own view of what someone in the position of the

Applicant should have done, which is an improper basis for a plausibility determination: *Valtchev*, above, at paras 6-8; *Ilyas*, above, at para 59.

[30] The Board's finding that the PSB would have known the Applicant was out of the country and would not have come looking for her at home is speculative and unreasonable, the Applicant says. She notes that IRB's Response to Information Request CHN103133.E, cited by the Board in relation to the Golden Shield database, states that there "are strict regulations on how to use the data in the project" and that it "is not used to track an individual who is not a criminal suspect according to Chinese criminal law...." The PSB only presented an arrest warrant on their fifth visit to her home in April 2012, and the evidence suggests that the local PSB would not have used the database to track her prior to the issuance of that warrant. In addition, the Board's finding ignores the Applicant's testimony regarding the assistance she received from a smuggler in getting through the security controls at the Beijing airport.

[31] With respect to the Board's findings regarding the absence of corroborative evidence, the Applicant argues that this cannot sustain a negative credibility determination when no other reason is given to doubt the credibility of an applicant. The other credibility findings here were speculative and ignored the Applicant's testimony, she argues, and the negative inference due to a lack of corroborating documentation cannot stand on its own: *Zheng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1274 at para 20.

Respondent

[32] The Respondent argues that the Board's negative credibility conclusion was based on four reasonable findings, and that a *sur place* claim did not perceptibly emerge from the evidence, such that a separate s. 97 analysis was not necessary.

Credibility findings were reasonable

[33] The Respondent says the Board reasonably found that: (1) the Applicant fled China before becoming a person of interest; (2) the Applicant alleged that the PSB continued to look for her despite being aware she was outside of the country; (3) no corroborative evidence was provided by the Applicant in support of her allegations; and (4) the Applicant's husband and son remained safe in China and had not been punished by the PSB.

[34] First, the Board reasonably found that the credibility of the Applicant's allegations was undermined by the fact that she left China approximately one month before she alleges the PSB began to look for her. While the Applicant disagrees with this finding, disagreement does not indicate a reviewable error: *Brar v Canada (Minister of Employment and Immigration)*, [1986] FCJ No. 346 (FCA); *V.M.A. v Canada (Minister of Employment and Immigration)*, 2009 FC 604 at para 21.

[35] Second, the documentary evidence indicates that the PSB have established a national policing database that includes *criminal fugitive information* and information *on passports and exit and entry*. The Board reasonably inferred from the documentary evidence that the Applicant

would have been entered into the database after she left China and became a person of interest to the PSB. As such, the Board drew a negative inference from the Applicant's allegation that the PSB went to her house on 6 separate occasions to arrest her, when they would have known that she was out of the country.

[36] While the Applicant asserts that she used a smuggler to exit China and may therefore not be included in the PSB database, she acknowledges that she used her own genuine passport, and fails to state why her use of a smuggler would prevent her passport from being entered into a routine exit log.

[37] Third, the Applicant testified that the PSB showed her husband an arrest warrant on their fifth visit to her house, but failed to provide a copy. When asked about this, she stated that her husband was not sure what the procedure was for requesting a copy. The Applicant also failed to provide reliable and trustworthy evidence that her friend, who introduced her to Falun Gong, had been charged and imprisoned for three years. As such, the Respondent argues, the Board reasonably drew a negative inference from the absence of corroborating evidence.

[38] Finally, the Applicant testified that neither her son nor her husband had suffered any consequences because of her Falun Gong practice, while the documentary evidence indicates that family members of Falun Gong practitioners are subject to punishment. The Board reasonably drew a negative inference about the Applicant's credibility from the lack of action by the PSB.

No sur place claim emerges perceptibly from the evidence

[39] While conceding that in some instances a *sur place* claim may be considered by the Board even if not specifically raised by a claimant, the Respondent argues that such a claim must "emerge perceptibly" from the claimant's evidence. Here, they argue, the Applicant failed to adduce sufficient evidence of her profile as a genuine Falun Gong practitioner in Canada, so nothing emerged from the record that required consideration of the *sur place* claim: *Pierre-Louis v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 420 at para 3, 46 ACWS (3d) 307 (FCA); *Guajardo-Espinoza v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 797 at para 5, 161 NR 132 (FCA).

[40] The Respondent says that a *sur place* claim arises where a claimant's fear of persecution is triggered by circumstances arising in their country of origin during their absence, or due to their own actions while outside their country of origin: *Ghzizaheh v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 465, 154 NR 236 (FCA); Office of the UN High Commissioner for Refugees, *Handbook on the Procedures and Criteria for Determining Refugee Status*, at paras 94-96; James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at pp. 33-34. Here, the Applicant's alleged reason for fleeing China was fear of persecution on the basis that she is a Falun Gong practitioner. The Applicant's evidence – which consisted only of her testimony – was that she was a Falun Gong practitioner before arriving in Canada; she provided no evidence that she became a Falun Gong practitioner while in Canada.

[41] The Respondent says the Board considered the Applicant's testimony and reasonably concluded that she was not a Falun Gong practitioner in China, that the PSB are not looking for her, that she became a practitioner in Canada only to bolster her refugee claim and is not a genuine practitioner, and that she can therefore safely return to her home in Tianjin.

[42] The principle that a negative credibility finding is generally determinative of a refugee claim is firmly established in the jurisprudence, the Respondent notes: see *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at paras 23, 29; *Yassine v Canada (Minister of Employment and Immigration)* (1994), 172 NR 308, 27 Imm LR (2d) 135 (FCA); *Mathiyabaranam v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1676, 140 FTR 263 (FCA); *Christopher v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1128. The Respondent argues that this principle is equally applicable to and consistent with this Court's jurisprudence on s. 97 of the Act, quoting *Mbanga v Canada (Minister of Citizenship and Immigration)*, 2008 FC 738 at para 21:

> That being said, the failure to proceed to a separate section 97 analysis is not fatal in every case. Where, as here, there is no evidence supporting a finding of a person in need of protection, this analysis will not be required: see, for example, *Ndegwa v. Canada (MCI)*, 2006 FC 847, 55 Imm. L.R. (3d) 108; *Soleimanian v. Canada (MCI)*, 2004 FC 1660, 135 A.C.W.S. (3d) 474; *Brovina v. Canada (MCI)*, 2004 FC 635, 130 A.C.W.S. (3d) 1002.

[43] In view of this, and given that the Applicant's s. 97 claim is based on the same fact scenario as her s. 96 claim, the Respondent says it was reasonable for the Board not to conduct a separate s. 97 analysis.

Applicant's Reply and Further Submissions

[44] The Applicant replies that she is not seeking a re-weighing of the evidence as the Respondent suggests. Rather, she is asserting that the Board's implausibility findings were speculative or contrary to the evidence before it.

[45] The Applicant argues that plausibility findings require an evidentiary basis that shows the events in question could not have occurred in the manner testified to by the Applicant. The Board's finding that it was implausible for the Applicant to leave China before the PSB tried to arrest her refers to no such evidence. Rather, the Board simply recites the facts and provides a final conclusion, based on nothing more than the Board's own version of what a reasonable person would do in that situation. The Applicant notes that the jurisprudence warns against basing implausibility findings on extrinsic criteria such as rationality, common sense and judicial knowledge: *Giron v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 481, 143 NR 238 (FCA) [*Giron*]; *Santos*, above, at para 15.

[46] The Applicant says the Board's credibility finding relating to continued visits by the PSB to her home ignores the evidence. She used a smuggler in order to safely leave China and circumvent any security issues at the airport. The Applicant was concerned that she would be stopped by the PSB if she travelled on her own passport. However, the smuggler assured her that he could get her through immigration and customs, and held her passport and took her through customs at the Beijing airport without incident (see transcript, Certified Tribunal Record at pp. 448-449). The Applicant says the Board failed to consider how the smuggler assisted her, or that

he was hired to ensure she would be able to circumvent security checks at the Beijing airport. Furthermore, the documentary evidence cited by the Board (CHN103133.E) states that the Golden Shield program is not used to track individuals who are not criminal suspects.

[47] The Applicant says that, contrary to the Respondent's assertions, her hearing testimony indicates that her husband and son *have* been subjected to punishment by police through repeated harassment and arbitrary interrogation. These are two of the forms of punishment listed in the documentary evidence: see UK Border Agency Report, Applicant's Record at p. 192.

[48] With respect to the *sur place* claim, the Applicant argues that such a claim does emerge perceptibly from the evidence. She testified that she is a committed Falun Gong practitioner in Canada, and has become a member of a practice group in Miliken Park, Scarborough (see transcript in Certified Tribunal Record at pp. 431-32). The Board declared itself satisfied with her knowledge of Falun Gong, and raised no concerns regarding the genuineness of her faith as a Falun Gong adherent in Canada. The Applicant says that the Board failed to consider evidence of a genuine conversion in Canada, and that motive, while it may be a factor, should not be the only factor considered with respect to genuineness as it was here. Those who initially join a religion to buttress a refugee claim may become true adherents along the way: *Xin Cai Hou v Canada (Minister of Citizenship and Immigration)*, 2012 FC 993 at paras 61-62, 65 [*Hou*]. While the Court in *Hou* ultimately upheld the finding that the applicant had not made out a *sur place* claim, the applicant in that case displayed limited knowledge of Falun Gong precepts and offered unconvincing statements in support of their practice in Canada (see para 69), which was not the

case here. In the present case, the finding of improper motive was the only basis for the Board's finding that the Applicant was not a genuine practitioner.

[49] The Applicant says there is clear evidence on the record that those who practise Falun Gong while abroad face persecution upon their return to China, and therefore the Board erred in not considering the *sur place* claim: *Jin*, above, at para 19.

[50] Contrary to the Respondent's submissions, the Applicant argues that under s. 97, negative credibility findings are not always dispositive of a claim. In this case, she says, a separate s. 97 determination was required based on her profile as a Falun Gong practitioner: *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 41.

ANALYSIS

[51] I agree with the Applicant that there are serious problems with the RPD's credibility findings involving speculation and factless opinions, but the errors that occur in the Board's *sur place* analysis are so serious that this matter must be returned for reconsideration on that basis alone.

[52] The Board's finding that "it is unreasonable that a person would leave her country before the PSB began to look for her" has no evidentiary basis and is simply the Board's own opinion of what might be expected in the circumstances. The Applicant gave a reasonable account of why

she left China when she did and the Board cites nothing to undermine that account other than its own opinion.

[53] Likewise the Board's finding that "it is reasonable to expect that her family members would have been subjected to some type of punishment" does not accord with the evidence. The Applicant explained the repeated visits to her house by the PSB. The country documentation speaks to a range of treatments of family members, from harassment and random visits by police to the home, to arbitrary detention and loss of job and state support, to arrests of family members. There is no evidence that supports the Board's contention that, reasonably speaking, the PSB would have done anything more than the Applicant says they did. The Board again relies upon its own opinion.

[54] These are plausibility findings and, as the Court has pointed out many times, such findings are inherently dangerous and should only be made in the clearest of cases: see *Valtchev*, above, at paras 6-8; *Giron*, above; *Leung v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 774 at para 15, 81 FTR 303 (TD); *Mahmood v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1526 at para 16; *Ansar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1152 at para 17; *Jung v Canada (Citizenship and Immigration)*, 2014 FC 275 at para 74. On the facts of this case, such findings were unreasonable.

[55] The Board's *sur place* analysis is not logical:

> [21] The panel questioned the claimant on her Falun Gong knowledge which was answered to the satisfaction of the panel. However, considering the panel's credibility concerns regarding the claimant's allegations, the panel finds that the claimant was not

> a Falun Gong practitioner in China. Therefore, the panel finds the claimant became a Falun Gong practitioner in Canada only to bolster her refugee claim.
>
> [22] Since the panel does not accept the claimant's allegations that she was a genuine Falun Gong practitioner in China, the panel finds the PSB are not seeking to arrest her. Further the panel determines that the claimant is not a genuine Falun Gong practitioner in Canada. Therefore, the panel finds the claimant can safely return to her home in Tianjin, China.

[56] The rationale here appears to be:

(a) The Applicant was not a genuine Falun Gong practitioner in China; therefore,

(b) The Applicant is not a genuine Falun Gong practitioner in Canada because she became a Falun Gong practitioner in Canada only to boost her claim; therefore,

(c) The PSB are not looking for her in China and she can safely return there.

[57] The problems with this line of reasoning are that:

(a) Even if the Applicant was not a genuine Falun Gong practitioner in China (and there are problems with this credibility finding) this does not mean that she cannot be a genuine Falun Gong practitioner in Canada, even if she did join Falun Gong here initially to boost her claim (a finding for which no evidence is cited);

(b) The Board finds that the Applicant provided satisfactory evidence of her knowledge of Falun Gong, but the Board fails to consider how someone with such knowledge and who has practised Falun Gong in Canada would be perceived and treated by the Chinese authorities on return, even though there is evidence that China keeps an eye on those who practise Falun Gong in Canada;

(c) The Board assumes that, if the Applicant was not a genuine practitioner of Falun Gong in China before she came to Canada, upon her return she will not practise Falun Gong in China. This does not follow. She may well have become a genuine practitioner in Canada, and genuine practitioners in China risk reprisals and are punished if they are found out;

(d) The Board concludes that the Applicant became a knowledgeable practitioner of Falun Gong in Canada to boost her claim but then fails to consider the consequences of this finding from a forward-looking perspective as required by law.

[58] The very nature of a *sur place* claim requires the Board to consider the full context of what the Applicant has done since she came to Canada. There is no real assessment by the Board of whether the Applicant has become a genuine Falun Gong practitioner in Canada. The bald assertion that she isn't genuine because she wasn't a genuine practitioner in China does not make logical sense and simply ignores the guiding jurisprudence of this Court on point. See, for example, *Huang*, above, at para 11, and *Hailu*, above, at para 6; *Jin*, above, at para 19; *Yin*, above, at paras 89-90.

[59] Motive can certainly be part of any analysis, but there was strong evidence here of a detailed and genuine knowledge of Falun Gong and long and persistent practice in Canada. There was no attempt by the Board to discover and consider whether the Applicant is now a genuine practitioner. The Board's analysis simply stops with the assertion that if the Applicant was not a genuine practitioner in China then she cannot be a genuine practitioner in Canada. The Applicant's counsel specifically raised these matters with the Board in written submissions and, although counsel did not specifically refer to it in submissions, there was also material evidence in the documentation before the Board of spying on those who practise outside of China and punishment upon return. These are all matters that the Board unreasonably left out of account with the bald conclusion that, because the Applicant was not a Falun Gong practitioner in China, she only "became a Falun Gong practitioner in Canada to bolster her refugee claim." Even if this were an appropriate finding on motive, the Board simply fails to consider whether, since making her refugee claim, the Applicant has become a genuine practitioner, or someone who will be perceived as such if she returns to China.

[60] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and set aside and the matter is returned for reconsideration by a different Board member.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Cheryl Robinson	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cheryl Robinson Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT