Federal Court  Cour fédérale

Date: 20141110

Docket: IMM-2640-13

Citation: 2014 FC 1057

Ottawa, Ontario, November 10, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

YANYAN MA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant was refused Canada's protection by the Refugee Protection Division of the Immigration and Refugee Board (the Board). She now seeks judicial review from this Court pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant asks for an order setting aside the Board's decision and returning the matter to another panel.

I. Background

[3] Yanyan Ma is a Chinese citizen. She arrived in Canada on October 9, 2011 and applied for refugee protection shortly thereafter. She claims to fear persecution for practicing Falun Gong. Her first hearing broke down due to interpretation issues, but she was heard again on March 12, 2013.

II. Decision Under Review

[4] The Board dismissed her claim in a decision dated March 20, 2013.

[5] The Board decided that the applicant lied about practicing Falun Gong in order to secure protection. It gave the following reasons for disbelieving her story:

1. The applicant said that she originally knew nothing about Falun Gong except that the government said it was an "evil cult". Still, she immediately started practicing it when her friend said that it cured heart disease. The Board did not believe that someone as well-educated as the applicant would immediately believe such a claim without any proof.
2. The applicant was evasive.
3. The applicant gave contradictory answers about whether she thought it was safe to practice Falun Gong, sometimes saying that they needed to post lookouts but

taking a long time to admit that they feared being raided by the Public Security Bureau. She also first said that she did not know what the lookouts did, but later described what they did in detail.

4. The applicant gave confusing testimony regarding what she knew about the consequences of practicing Falun Gong for her and her parents.

5. About the alleged raid of her practice group, the applicant said that she did not hear anyone yelling for her to stop when she was fleeing. She also did not notice if anyone else escaped and made it to the highway. The Board said this seemed unlikely.

6. The Board found that the summons the applicant submitted to the Board was likely not genuine because it did not identify any reasons for its issuance.

7. Although the applicant says that she hired someone to smuggle her out of the country shortly after the alleged raid in April 2011, she did not leave the country until October of that year. The Board did not believe that a smuggler would wait so long, especially since that was just before the fraudulent visa would expire. Further, the applicant alleged that the smuggler let her keep her passport with the fraudulently obtained visa. However, that could be traced back to the customs official who assisted them and the Board felt that no smuggler would expose his or her accomplice to that kind of jeopardy.

[6] The Board accepted that the applicant did start practicing Falun Gong when she came to Canada and correctly answered questions about it. However, because she lacked credibility, the Board concluded that she had done this just to bolster her fraudulent claim. There was also no

hard evidence that the Public Security Bureau would know about her practices in Canada or believe her to be a Falun Gong practitioner if she returned.

[7] Consequently, the Board concluded that the applicant was not entitled to protection under either section 96 or subsection 97(1) of the Act.

III. Issues

[8] This application raises only two issues:

A. What is the standard of review?

B. Did the Board unreasonably assess the applicant's credibility?

IV. Applicant's Written Submissions

[9] The applicant does not discuss the standard of review, but implicitly accepts that it is reasonableness. Still, she observes that the Court may still overturn findings of credibility where the evidence cannot support the reasons. Here, the applicant submits that the Board's findings were speculative and microscopic.

[10] Specifically, she argues that it was perverse for the Board to question the applicant's deeply held spiritual belief in the healing power of Falun Gong.

[11] Also, the applicant says that her answers about the safety of the practice group were not contradicted by her admission that they posted lookouts. Rather, she was simply saying that the

group was safe because they took precautions like that. Further, there is nothing implausible about the applicant knowing there could be consequences without knowing what those consequences were.

[12] The applicant also criticizes the Board's reasons about the raid. The member was not present, so his conjecture that other practitioners would have run for the road was not a legitimate basis to discredit the applicant.

[13] Further, the documentary evidence shows that summons documents are not required to list the reasons and the authorities often act in procedurally irregular ways. Indeed, even the fact that the summons was left with her family and not delivered directly to her was improper. The applicant says the Board was wrong to assume that this summons would have been obtained in any more procedurally competent manner.

[14] As for the delay between the raid and the applicant's departure from China, she had no control over the smuggler's schedule. The Board has no expertise in the smuggling business and the applicant submits that there could be any number of reasons why it took so long.

[15] Finally, the applicant says it was perverse for the Board to dismiss her knowledge of Falun Gong practices. It made this line of questioning a futile charade, since her claim would be dismissed whether she was right or wrong.

V. Respondent's Written Submissions

[16] The respondent submits that the standard of review is reasonableness and the Board is owed deference to its credibility findings. The respondent then defends the Board's decision by addressing the applicant's arguments.

[17] First, the Board did not dismiss the content of the applicant's belief. Rather, it simply observed that it was implausible that an intelligent woman like the applicant would be convinced that Falun Gong could cure heart disease just because her friend said so.

[18] Second, the respondent says that the applicant's testimony was evasive and confusing. She repeatedly backtracked, contradicted herself and gave indirect answers about the safety of her group and the lookouts they employed. Further, the applicant had eighteen years of education and attended the Shenyang Broadcasting and Television University. The respondent says it was implausible that she would be unaware of government actions against Falun Gong practitioners and the applicant's only argument to the contrary is a bald assertion.

[19] Third, the respondent notes that there were fifteen members in the building when the group was allegedly raided. It says it was reasonable for the Board to assume that some of them would also have gone to the main road seeking transportation. As such, its finding that the applicant lacked credibility for not noticing them is unassailable; the Board is entitled to make implausibility findings.

[20] Fourth, the Board expressly acknowledged that the procedure for obtaining summons was not standardized throughout China. However, the respondent says that the applicant's argument ignores the fact that the Board had seen hundreds of summonses, all of which identified the reasons.

[21] Fifth, the respondent attacks the applicant's argument about the smuggler. Although the applicant claims that there could be any number of reasons for a smuggler's delay, the respondent notes that the applicant never identified any at the hearing. The applicant never challenged the Board's finding that a smuggler would not have exposed his accomplice by letting the applicant keep her passport.

[22] Finally, the respondent says that the totality of the evidence revealed that the applicant only started practicing Falun Gong in Canada to bolster her refugee claim. That was a reasonable finding and it justifiably makes her ability to answer some basic questions about their beliefs irrelevant.

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[23] Both parties accept that the standard of review is reasonableness for the Board's credibility findings. Both are right (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) at paragraph 4, 160 NR 315 [*Aguebor*]). The Board's

decision should not be disturbed so long as it is justifiable, transparent, intelligible and its outcome is defensible in respect of the facts and law (*Dunsmuir* at paragraph 47). Put another way, I will set aside the panel's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708).

[24] The range of reasonableness will often be quite wide for credibility findings. As Mr. Justice Luc Martineau has observed, "credibility is the heartland of the Board's jurisdiction." (see *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at paragraph 18, [2003] 4 FC 771 [*Mohacsi*]). In *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at paragraph 42, [2012] FCJ No 369 [*Rahal*], Madam Justice Mary Gleason said that this is because "the tribunal had the advantage of hearing the witnesses testify, observed their demeanor and is alive to all the factual nuances and contradictions in the evidence." As such, its findings should not be lightly disturbed.

[25] That said, the applicant is right to say that they are not immune from review (see *Yada v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 37 (QL) at paragraph 25, 140 FTR 264; *Mohacsi* at paragraphs 18 to 22; *Rahal* at paragraphs 41 to 46).

B. *Issue 2 - Did the Board unreasonably assess the applicant's credibility?*

[26] Although the applicant makes some good points, I ultimately agree with the respondent that the Board's decision was reasonable.

[27] First, I agree with the applicant that the Board's assumptions about the raid were problematic. Although other members of her practice group likely would have run to the main road, it is not surprising that a panicking person might not pay attention to that. More importantly, these are very minor details that have no real relevance to her claim.

[28] However, one error of that type is not necessarily enough to render a decision unreasonable. As Madam Justice Judith Snider explained in *Konya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 975 at paragraph 22, 63 Admin LR (5th) 27, "a microscopic analysis is one in which the Board examines a fact which has no material relevance to any issue; is outweighed by other evidence; and, is not central to the issues in the case, but is used to dispose of the case." The Board did not use this finding that other members of the group would have made it to the road to dispose of the case and it was but one minor element in a general credibility finding that is otherwise reasonable for the following reasons.

[29] For one thing, the applicant supports her argument about the Board questioning her beliefs by quoting from *Wang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 346 at paragraph 7, 9 Imm LR (4th) 78. There, Mr. Justice Donald Rennie said that "[i]t is not permissible for the Board to speculate on the plausibility of a claimant obtaining personal benefits from a religious or spiritual practice, much less base a negative credibility finding on such speculation."

[30] However, that is not what happened here. Rather, the applicant's testimony was that all that she had heard about Falun Gong previously was that it was an "evil cult". Still, she said that

she immediately believed that it cured her friend's heart disease based on nothing more than her friend's statement. The Board considered a conversion based on such flimsy evidence to be unlikely for someone as highly educated as the applicant. I cannot say that inference was unreasonable (*Aguebor* at paragraph 4).

[31] As for her next argument, I agree with the applicant that there is no necessary inconsistency between saying that a group is safe and that it posts lookouts. The Board seemed to interpret the applicant's statement that it was safe as a declaration that it was generally safe to practice Falun Gong, but it is at least arguable that she was simply saying that her group was safe because it took precautions like posting lookouts.

[32] However, the fact that an alternate understanding of the applicant's testimony might also be reasonable does not make the member's decision unreasonable. He was there. He observed how the applicant was answering these questions and those answers were confusing and indirect. He judged her evasiveness. Having reviewed the transcript, that was a reasonable finding that he was entitled to make.

[33] As for the specific consequences to her and her parents, I can see the applicant's point. It is not that implausible that an average citizen would not know the precise consequences of committing any particular crime. However, the Board observed that the applicant was not the average citizen and that she had eighteen years of education and attended the Shenyang Broadcasting and Television University. The Board found it implausible that someone with that background would take up a practice she knew to be illegal and yet never concern herself with

what the consequences might be. Besides, on this subject too the Board found that she was evasive. In light of that, the Board's conclusion was reasonable.

[34] So too was the Board's treatment of the summons. The Board dismissed the summons because it did not state the reasons for its issuance and the Board found that it was "reasonable to assume that, at minimum, the reason for the issuance of a summons would be noted in the document." The Board had also seen hundreds of genuine summons, all of which stated the offence.

[35] The applicant criticizes this finding, pointing out that the documentary evidence showed that a summons only needs to state "the person, time, and place of appearance for questioning" (Research Directorate of the Immigration and Refugee Board of Canada, RIR CHN42444.E, *China: Circumstances and authorities responsible for issuing summonses/subpoenas* (1 June 2004)). However, that referred to a simple summons (*zhuanhuan*), while the document submitted by the applicant purported to be an arrest summons (*juzhuan zheng*). Those are obtained by a different procedure, which requires an application to be presented that "will state clearly and support with credible evidence that a crime has been committed, the person to be arrested – summoned for interrogation is connected to the crime, and the suspect is not likely to appear". Given that, it was justifiable for the Board to assume that the summons issuing from that process would include some of that information as well.

[36] Further, the Board said that some places in China did not follow the proper procedure, so the applicant criticized the Board for assuming that this summons was procedurally regular even

though it was not even served on her personally. However, having found that the document was fraudulent, the Board evidently did not believe that it was served on her family by any actual officers of the Public Security Bureau. Therefore, no inference could be drawn from the manner in which that service allegedly happened.

[37] That said, the Board's treatment of the summons was somewhat problematic for a different reason. Generally, documents purported to have been issued by a foreign state are presumed to be valid (see *Azziz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 663 at paragraph 67, 368 FTR 281). Although the Board might be able to rely on its expertise to rebut that presumption, the member never actually disclosed to the applicant the reason he was concerned about the summons. In essence, he made factual findings based on his personal knowledge that the applicant could not have expected to address and that was unfair. However, in light of my analysis above, I am satisfied that it could not have affected the result.

[38] As for the smuggling operation, the Board does not need to be an expert in the smuggling business to infer that a smuggler would want to move a wanted person out of the jurisdiction as soon as possible. I cannot say that was unreasonable and the applicant has not challenged the Board's inferences about the passport.

[39] Since the Board reasonably found that the applicant was lying about her Falun Gong practice in China, its inference that she only started it in Canada to bolster her fraudulent refugee claim was reasonable. This allowed it to reasonably dismiss her knowledge of Falun Gong as it could have been accumulated in Canada.

[40] The applicant comments that this makes the Board's questions on that subject a futile charade. That is not so. Although they ultimately turned out to be irrelevant, there is no reason to assume that the Board had made its decision before the interview concluded. It was no error for the Board to ask questions that could have been relevant to its decision, even though in hindsight they turned out not to be.

[41] Consequently, the credibility findings were defensible and I understand the Board's reasons for making them.

[42] I would therefore dismiss this application for judicial review.

[43] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

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

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
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.
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.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michael Korman	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Otis & Korman Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT