Federal Court  Cour fédérale

Date: 20150105

Docket: IMM-5833-13

Citation: 2015 FC 5

Ottawa, Ontario, January 5, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ZHIAN ZHOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background and Nature of the Matter

[1] The Refugee Protection Division [the RPD] of the Immigration and Refugee Board of Canada refused Mr. Zhou's request for protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], and he now applies for judicial review pursuant to section 72(1) of the *Act*, requesting that the Court set aside the RPD's decision and return the matter to the RPD for reconsideration.

[2] Mr. Zhou [the Applicant] is a citizen of China who arrived in Canada on May 18, 2011. He sought refugee protection two weeks later, claiming that he started practicing Falun Gong in China to cure his back problems and that he fears persecution ever since his practice group was raided by China's Public Security Bureau [the PSB] on March 6, 2011.

II. Decision under Review

[3] In its decision dated August 1, 2013, the RPD found that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Act*.

[4] For the RPD, the Applicant's claims hinged on credibility, and the Applicant had none. Though mindful of the presumption of truthfulness (*Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FCR 302 at 305, 31 NR 34 (CA)), the RPD gave many reasons for disbelieving the Applicant's claims:

- His parents sent important personal documents to him in his own name, even though he was allegedly wanted by the PSB and the Chinese authorities are known to monitor mail;
- He submitted these personal documents late and claimed that he did not know that he should have kept the envelope even though he had experienced immigration counsel;
- He said in his personal information form [the PIF] that he had left his resident identity card in China, but testified at the hearing that he brought it with him. The RPD did not accept his explanation that this was due to an interpreter or consultant error, since the PIF had been translated back to him before he signed it;

- He had engaged a smuggler some three months before his practice group was raided, allegedly because he was afraid he might have to leave the country on short notice. Since the Applicant had a wife and a child in China, the RPD did not believe he would continue practicing Falun Gong if he was that afraid of being discovered as such;
- His alleged fear of discovery was inconsistent with the fact that he never made any substantial inquiries into the safety of his Falun Gong group practices or how long they had been operating;
- There was a discrepancy in the amount of money he said that he paid the smuggler;
- He claimed that he had gone to four or five different doctors about his back, but only supplied a medical booklet for one visit. He claimed that he lost the booklets recording the other visits, but the RPD found that those visits should have been recorded in the same booklet and that, in any event, the smuggler would have told the Applicant about the importance of keeping documentation;
- The Applicant testified that his back condition was improving just by performing the qi qong exercises without learning any Falun Gong philosophy. Since qi qong exercises are legal and were working, the RPD did not believe that the Applicant would take the risk of joining a Falun Gong group;
- The Applicant originally said that he never learned any philosophy with the group, and it was only after he was asked by the RPD that he mentioned an older member who would occasionally come and read to the group;

- The Applicant testified before the RPD that his Falun Gong group had no instructor, but in his PIF he had stated that lookouts alerted his instructor about the alleged raid;
- The Applicant testified that he ran away during the raid by the PSB and never looked back, but the RPD considered it unlikely that he would not look back to see if he was being followed;
- At the hearing, the Applicant stated that he went to his wife's aunt's house after the raid, but he had told an immigration officer that he had gone to a friend's house;
- There were some inconsistencies about when the PSB required the Applicant to report to them and also as to whether the PSB mentioned Falun Gong on their first visit to the home of the Applicant's parents;
- Only when questioned by the RPD did the Applicant say that the PSB looked for him at work; and
- The Applicant called Falun Gong a religion in his PIF narrative, but at the hearing testified that Falun Gong was not a religion.

[5] In view of the foregoing findings, the RPD rejected the Applicant's credibility and found that he had never practiced Falun Gong in China. Although the Applicant started practicing Falun Gong when he arrived in Canada and so had some knowledge about it, the RPD determined that he did this only to support his fraudulent refugee claim. Furthermore, the RPD found that the Applicant would not be perceived as a genuine adherent of Falun Gong in China, and that there was only a remote possibility that he would be of any interest to Chinese

authorities because of his participation in such activities here in Canada. The RPD therefore rejected the Applicant's claim.

III. The Parties' Submissions

A. *The Applicant's Arguments*

[6] The Applicant advanced three arguments: firstly, that the RPD conducted a microscopic analysis and focused unduly upon trivial inconsistencies with the Applicant's claims; secondly, the RPD made highly speculative plausibility findings on critical issues; and thirdly, because of these first two problems, the RPD unreasonably rejected the Applicant's claims and, in particular, his claim of being an adherent of Falun Gong.

[7] The Applicant asserts that it was unreasonable for the RPD to focus upon minor inconsistencies such as to where the Applicant fled following the raid by the PSB. Furthermore, citing *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, 208 FTR 267, the Applicant argues that the RPD made various unreasonable and speculative plausibility findings; for example, the Applicant says it was unreasonable for the RPD to speculate on how one should act when escaping the PSB.

[8] The Applicant further submits that some of the RPD's conclusions or findings were made without any evidence or were unexplained, such as the RPD's finding that the Chinese authorities monitor mail.

[9] In view of the RPD's findings listed above (as well as others which the Applicant pointed to during the hearing of this matter), the Applicant says the RPD's conclusion that the Applicant is not a genuine adherent of Falun Gong is unreasonable. He also argues that the RPD failed to properly consider the possibility of a *sur place* claim based on his practice of Falun Gong in Canada.

B. *The Respondent's Arguments*

[10] The Respondent relies upon *Lopez v Canada (Citizenship and Immigration)*, 2014 FC 102 at para 30, 23 Imm LR (4th) 4, to argue that the RPD is entitled to draw reasonable conclusions with respect to credibility based on implausibility, common sense and the rationality of an applicant's narrative, and may reject testimony if it does not accord with the probabilities.

[11] The Respondent further argues that the RPD's negative credibility findings were not based upon a microscopic reading of the evidence in an over-zealous effort to disbelieve the Applicant. Even if the Board did make negative findings with respect to some peripheral issues, the Respondent submits that a number of the RPD's negative findings related to central aspects of the Applicant's claims and were amply supported by the evidence. The Respondent says every element of the claims advanced by the Applicant justifiably raised credibility concerns.

[12] As a whole, the Respondent states that the RPD's decision is reasonable and that its conclusions concerning the Applicant's Falun Gong practices in China and here in Canada were justified.

IV. Analysis

[13] Credibility findings by the RPD have been described as "the heartland of the Board's jurisdiction", since they are essentially pure findings of fact that are reviewable on a reasonableness standard (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; *Aguebor v Canada (Minister of Citizenship and Immigration)* (1993), 160 NR 315 at para 4, [1993] FCJ No 732 (QL) (CA) [*Aguebor*]; *Singh v Canada (Minister of Employment and Immigration)* (1994), 169 NR 107 at para 3, [1994] FCJ No 486 (QL) [*Singh*]; and *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at para 17, 403 FTR 46). Moreover, it is well-established that deference is to be afforded to the findings of a tribunal such as the RPD in matters of credibility.

[14] The central issue before the Court, therefore, is whether the RPD made unreasonable credibility and plausibility findings with respect to the Applicant's claims and, in particular, whether the RPD's conclusion that the Applicant was not a genuine Falun Gong practitioner was reasonable.

[15] A useful summary of the principles that should be applied to a review of the RPD's credibility findings can be found in *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 42-46, [2012] FCJ No 369 (QL), where my colleague Madam Justice Mary Gleason states as follows:

> **42** First, and perhaps most importantly, the starting point in reviewing a credibility finding is the recognition that the role of this Court is a very limited one 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. Moreover, in many cases, the tribunal has expertise in the subject matter at issue that the reviewing court lacks. It is therefore much better placed to make credibility findings, including those related to implausibility. Also, the efficient administration of justice, which is at the heart of the notion of deference, requires that review of these sorts of issues be the exception as opposed to the general rule. As stated in *Aguebor* at para 4:

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review...

(see also *Singh* at para 3 and *He v Canada (Minister of Employment and Immigration)*, 49 ACWS (3d) 562, [1994] FCJ No 1107 at para 2).

43 Second, contradictions in the evidence, particularly in a refugee claimant's own testimony, will usually afford the RPD a reasonable basis for finding the claimant to lack credibility, and, if this finding is reasonable, the rejection of the entire refugee claim will not be interfered with by the Court (see e.g. *Rajaratnam v Canada (Minister of Employment and Immigration)* (1991), 135 NR 300, [1991] FCJ No 1271 (FCA); *Mohacsi v Canada (Minister of Citizenship and Immigration)*, [2003] 4 FC 771, [2003] FCJ No 586 at paras 18-19 [*Mohacsi*]). That said, the contradictions which underpin a negative credibility finding must be real as opposed to illusory. Thus, the tribunal cannot seize on truly trivial or minute contradictions to reject a claim (see e.g. *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168, [1989] FCJ No 444 at para 9; *Mohacsi* at para 20; *Sheikh v Canada (Minister of Citizenship and Immigration)*, (2000) 190 FTR 225, [2000] FCJ No 568 at paras 20-24).

44 Third, while the sworn testimony of a claimant is to be presumed to be true in the absence of contradiction, it may reasonably be rejected if the RPD finds it to be implausible. However, a finding of implausibility must be rational and must also be duly sensitive to cultural differences. It must also be clearly expressed and the basis for the finding must be apparent in the

> tribunal's reasons (see e.g. *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, 2003 FCJ No 162 at para 12 [*Lubana*]; *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937, [2004] FCJ No 1149 at para 15).
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> **45** Fourth, the RPD may legitimately have regard to witness demeanor, including hesitations, vagueness and changing or elaborating on their versions of events. These sorts of matters may reasonably underpin a credibility finding, but it is preferable if there are additional objective facts to support the finding (see e.g. *Faryna v Chorny*, [1952] 2 DLR 354, [1951] BCJ No 152; *Hassan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1136 at para 12).
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> **46** Finally, where a decision turns on credibility, it is incumbent on the RPD to provide reasons for its assessment given the importance of the issues at stake in a refugee claim. A generalized, imprecise and vague credibility conclusion without particulars is subject to being set aside on review (see e.g. *Hilo v Canada (Minister of Employment and Immigration)* (1991), 15 Imm LR (2d) 199, [1991] FCJ No 228 (FCA)).

[16] With these principles in mind, the Court must respect and cannot interfere with a decision unless it is satisfied that the reasons of the RPD are not justified, transparent or intelligible and that the result does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[17] The Applicant argues that the RPD conducted a microscopic analysis of trivial inconsistencies, something which this Court has disallowed in cases such as: *Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 at paras 3-9, [1989] FCJ No 444 (QL) (CA); *Huang v Canada (Citizenship and Immigration)*, 2008 FC 346 at para 10, 69 Imm LR (3d) 286; and *Dong v Canada (Minister of Citizenship and Immigration)*, 2010 FC 55 at paras 23-28, [2010] FCJ No 54 (QL). A microscopic analysis is one whereby a tribunal examines

a fact which has no material relevance to any central issue and is outweighed by other evidence, but is nonetheless utilized to dispose of the case (*Konya v Canada (Citizenship and Immigration)*, 2013 FC 975 at para 22, 439 FTR 242).

[18] In this case, the RPD did not conduct a microscopic analysis. While the RPD did make negative findings with respect to a few peripheral issues, such as the place to where the Applicant fled following the alleged raid by the PSB in 2011, a number of the negative findings were clearly supported by the evidence and related to central aspects of the Applicant's claim. The RPD examined the Applicant on various inconsistencies in his testimony that was material and central to his claims, including the extent of his knowledge of Falun Gong, the circumstances of the alleged raid in March, 2011, and the nature of the weekly group meetings.

[19] The fact that the RPD may not be allowed to embark upon a microscopic analysis to achieve a desired outcome does not relieve a refugee claimant from the burden to provide credible evidence to establish the claim. Although a claimant is presumed to tell the truth, if concerns arise as to the veracity of evidence or the credibility of the claimant, the RPD is clearly entitled and, indeed, expected to question the claimant about it.

[20] The Applicant also argues that the RPD made highly speculative plausibility findings on critical issues relating to such matters as the PSB raid, the Falun Gong group practice and the Applicant's receiving identity documents from his parents in China. I disagree. To the extent that the RPD may have made any plausibility findings at all, those findings were rational, based on a

common sense assessment of the evidence, and duly sensitive to cultural differences; in short, they were reasonable.

[21] It should be noted that, although the RPD did not explicitly assess the Applicant's *sur place* claim, it nonetheless at least implicitly addressed this matter in the last two paragraphs of its reasons before its final conclusion, where the RPD stated as follows:

> [39] Having previously found the claimant's testimony in regard to his FG [Falun Gong] practice affiliation in China not credible, I find that, on a balance of probabilities, and in the context of all the findings and negative inferences drawn above, that his allegation that he was a FG practitioner in China is fraudulent. The claimant has alleged that the impetus to practice FG took place as a result of a set of circumstances which occurred in China. He alleges that his continued practice of FG in Canada is a continuation of her [*sic*] alleged practice in China. Having found that he was not a FG practitioner in China, and having no evidence of an impetus to practice FG in Canada or a conversion type of experience in Canada, I find, on a balance of probabilities and in the context on [*sic*] the findings noted above, that the claimant joined a FG group in Canada only for the purpose of supporting a fraudulent refugee claim. On the basis of the totality of the evidence disclosed, I find the claimant is not a genuine adherent of Falun Gong, nor would he be perceived to be one in China.
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> [40] Counsel submits that the Chinese consulate in Canada would have the claimant's photograph from the FG activities he has participated in, and the claimant would therefore be in danger of persecution if he returns, even if he is not a genuine practitioner. I find that it is only a remote possibility that the claimant would be recognized or be of any interest to Chinese authorities, as he does not have any kind of profile beyond these supposed photographs.

[22] There was relatively little evidence before the RPD that the Applicant practiced Falun Gong in Canada. The documentary evidence before the RPD consisted of four photographs showing the Applicant and others apparently in front of Falun Gong banners in various locations, together with a terse letter from an alleged fellow practitioner confirming that the two often

practiced Falun Gong together on the weekends, that the Applicant participated in the annual Dafa Assembly and demonstration, and that the Applicant was "a genuine Falun Gong practitioner".

[23] This Court has held that it is permissible for the RPD to assess an applicant's genuineness and therefore his *sur place* claim in light of credibility concerns relating to the original authenticity of a claim: *Hou v Canada (Citizenship and Immigration)*, 2012 FC 993 at para 57, [2014] 1 FCR 405 [*Hou*]; *Yang v Canada (Citizenship and Immigration)*, 2012 FC 849 at para 19, [2012] FCJ No 961 (QL); *Ma v Canada (Citizenship and Immigration)*, 2014 FC 1057 at paras 39-40.

[24] At the hearing, the RPD's questions were limited to an assessment of the Applicant's knowledge of Falun Gong theory and his practice in China. The Applicant gave no other testimony as to his practice of Falun Gong in Canada, nor did his counsel ask him any questions as to his practice of Falun Gong. Also, the Applicant did not call his alleged fellow practitioner to testify or, for that matter, any other witness.

[25] The RPD clearly weighed the competing evidence before it in making its determination that the Applicant's claim was fraudulent. Although the Applicant demonstrated some knowledge of Falun Gong and had some, albeit limited and weak documentary evidence in support of his claim, I do not think it was unreasonable for the RPD to conclude that the Applicant was not a genuine practitioner of Falun Gong. This finding by the RPD is well "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

V. Conclusion

[26] In the end, I find the facts and circumstances of the Applicant's claim similar to, and in many respects, indistinguishable from those before this Court in *Hou* and in *Su v Canada (Citizenship and Immigration)*, 2013 FC 518, [2013] FCJ No 588 (QL), where the Court declined to intervene with the RPD's decisions.

[27] This being so, the Applicant's application for judicial review should be and is hereby dismissed.

JUDGMENT

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

No serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5833-13
STYLE OF CAUSE:	ZHIAN ZHOU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 21, 2014
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JANUARY 5, 2015

APPEARANCES:

Lev Abramovich	FOR THE APPLICANT
Kevin Doyle	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Levine Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT