Federal Court  Cour fédérale

Date: 20160323

Docket: IMM-3438-15

Citation: 2016 FC 346

Ottawa, Ontario, March 23, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**ZHIHUI ZHONG, AND YANYI FENG,
JINJUN ZHONG, AND JINPENG ZHONG,
BY HIS DESIGNATED REPRESENTATIVE,
ZHIHUI ZHONG**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Zhihui Zhong, his spouse, and their two sons are all citizens of China. Mr. Zhong, the primary applicant [the Applicant], alleges he is wanted by the Public Security Bureau [PSB] in China for his practice of Falun Gong. The Applicant started practicing Falun Gong with several other practitioners in October 2012 to deal with his poor sleep and concerns about his business. On January 12, 2014, the Applicant says he skipped a Falun Gong practice session to receive a

delivery at his hardware store, and that he was to meet with his friend, Mr. Chen, later that evening. Mr. Chen failed to meet with the Applicant as scheduled, and when he could not reach Mr. Chen by phone the Applicant called Mr. Chen's brother, who advised him that Mr. Chen and the other practitioners had been arrested. Consequently, the Applicant realized he could be in danger, and he went to his uncle's house to hide. His uncle bought tickets for the Applicant and his family to flee to the United States and arranged for a snakehead to take them from the US to Canada where they were to meet a friend of his uncle.

[2] The Applicant and his family left China on January 15, 2014, and arrived in Toronto on January 18, 2014. In early February 2014, they claimed refugee protection on the basis of the primary Applicant's practice of Falun Gong and being wanted by the PSB in China. The Refugee Protection Division [RPD] of the Immigration and Refugee Protection Board [the Board] rejected their claims though in a decision dated March 31, 2015. They appealed the RPD's decision to the Refugee Appeal Division [RAD] of the Board, but the RAD refused the new evidence they submitted and dismissed the appeal in a decision dated July 2, 2015. The Applicants now ask this Court, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], to set aside the RAD's decision and return the matter to a different member of the RAD for re-determination.

I. The RAD's Decision

[3] The RAD first considered the admissibility of the new evidence. The Applicant submitted a letter dated May 5, 2015 from Mr. Yonghui He along with a copy of a positive RPD decision for Mr. He. The RAD, however, rejected this letter because it only expanded upon Mr. He's

earlier letter which had been before the RPD and the additional information could reasonably have been included in the original letter from him. In addition, the RAD noted that the letter was not probative because, although it states the Applicant is a genuine Falun Gong practitioner, it did not provide information as to Mr. He's expertise as an evaluator of what constitutes such a practitioner. The RAD also noted that the Applicant had been represented throughout by counsel, and the "egregious delay" in acquiring this allegedly probative documentation was not credible and thus refused to accept it.

[4] The RAD also rejected pictures of a Falun Gong parade in Toronto in May 2015, since they did not bring new evidence to the appeal and did not go to the genuineness of the Applicant's Falun Gong practice. Photographs of the Applicant's participation in Falun Gong activities had been before the RPD and, consequently, the RAD did not accept the more recent photos as new evidence. The RAD refused to accept as new evidence a further affidavit from the Applicant as an attempt to give further testimony that could have been given at the RPD hearing.

[5] The RAD also refused to accept as new evidence an alleged summons directed to the Applicant, as well as an alleged warrant for the person who had introduced the Applicant to Falun Gong in China, on the basis that these documents could have been available for the RPD hearing and it would have been reasonable for the Applicants to ask the RPD to consider the documents as a post-hearing disclosure before rendering its decision. The RAD found the Applicant's explanation for the delay in submitting these documents - that he did not understand their importance - was neither reasonable nor credible, and no reasonable explanation had been given for the delay in submitting such documentation.

[6] The RAD also rejected letters from the Applicant's parents and uncle, determining that these letters could have been produced at the RPD hearing. In this regard, the RAD found the Applicant's explanation that he had not been asked for these letters to be "fallacious", and that because he had been represented by counsel they should have been submitted before the RPD.

[7] Lastly, with regard to the bank books of the Applicant's parents, the RAD found that the issue of his parents' pensions being cancelled had been addressed at the RPD hearing, and it would have been reasonable for this evidence to be submitted prior to the hearing or before the RPD made its decision. Thus, the RAD determined that as no new evidence was being admitted, there would not be an oral hearing.

[8] After reviewing the background facts and outlining its role to conduct an independent assessment in view of *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, [2014] 4 FCR 811, the RAD then proceeded to address the merits of the appeal. First, the RAD assessed the Applicant's testimony before the RPD about the Zhuan Falun, noting the RPD's finding that the Applicant was not, on a balance of probabilities, a Falun Gong practitioner. For its part, after reviewing the Applicant's evidence and testimony as to his practice of Falun Gong, the RAD concluded as follows:

> [45] The appellant did answer some basic questions about Falun Gong, such as identifying the leader, where he was located, when Falun gong was started, and when the Chinese authorities banned Falun gong in China. The answer to these basic questions does not indicate a genuine Falun gong practitioner. This information could be learned by study, not because of commitment to the practice of Falun gong. The appellant provided photographs of himself participating in Falun gong activities. Just because the Appellant posed for a picture doing Falun gong activities is [*sic*, does] not mean that he is a genuine Falun gong practitioner. These

> photographs do not overcome the negative findings of the RPD and RAD regarding the Appellants extraordinarily limited knowledge about the basic concepts of Falun gong.
>
> [46] The RAD finds, on a balance of probabilities, that the Appellant was not a practitioner of Falun gong in China, nor is he a genuine Falun gong practitioner in Canada. His lack of understanding of even the basic concepts of Zhuan Falun is telling.

[9] After making this finding, the RAD found that the RPD's assessment of an inconsistency between the Applicant's Basis of Claim form and CIC information forms was an error; one which, however, was not determinative of the overall appeal because there were other determinative issues which supported the RPD's decision.

[10] One such issue was whether the PSB was pursuing the Applicant and the PSB's attendances at the home of the Applicant's parents. After noting the RPD's determination in this regard, the RAD stated as follows:

> [54] The RAD find[s] it reasonable that if the PSB, as alleged by the Appellant, visited his home on six or seven different occasions after he left China, that the PSB would have issued some documentation. … No documentation was submitted at the hearing to support the allegation that the PSB was looking for the Appellant. Documentation submitted, regarding this issue, under the heading of New Evidence, was not accepted, for the reasons provided. The RPD drew a negative inference about the Appellant's credibility because he did not produce documentation from the Public Security Bureau (PSB) to substantiate his allegations that he was being sought by them. … Given that his reason for leaving China is that he was wanted by the PSB and according to his testimony they continue to look for him, it is reasonable that such a document would have been available for the October 31, 2014 hearing, or before the decision was made on March 31, 2015. …
>
> [56] In listening to the recording, the Appellant did mention, spontaneously and after his initial response, that his parents have lost their pension. No documentation was provided to support this

> allegation, nor was any documentation provided to support this allegation prior to the decision on March 31, 2015. Documentation submitted with the Memorandum of Appeal was not accepted under the Act. His lack of inquiry into the situation in China, and securing documents, in a timely fashion, are probative. Given the above, the RAD finds, on a balance of probabilities, that the Appellant was not wanted by the authorities in China.

[11] In addition, the RAD agreed with the RPD that if the Applicant feared for his life, he would have made a claim in the US when he first arrived there. Although the RAD did acknowledge it was possible the Applicant was following instructions from his uncle, the RAD found it was not credible that the Applicant, who does not have family in Canada, would have come into Canada illegally after he had arrived legally in the US. The RAD, like the RPD, also found on a balance of probabilities that because the Applicants left China on their own documentation, they were not wanted by Chinese authorities.

[12] Lastly, as to the lack of supporting documentation, the RAD concurred with the RPD, stating that:

> [68] The RAD concurs with the RPD's findings regarding the lack of probative documentation. It would be reasonable, given the egregious nature of the allegations made by the Appellant, and the fact that he was supported by experienced counsel, that appropriate documentation would have been submitted prior to the refugee hearing, or before the decision was made on March 31, 2015. At least, when the deficiencies in documentation were noted by the RPD at the hearing on October 21, 2014, an effort would reasonably have been made to acquire such documentation as soon as possible, or indicate that inquiries and efforts were being made to acquire such documentation. According to the RPD Rules, it was open to the Appellant to bring an application and request that he be permitted to submit post hearing evidence. The RAD draws a negative inference from the Appellant's failure to produce, in a timely fashion, appropriate documentation to substantiate his claim, or indicate a serious effort to acquire such documentation.

[13] In the result, the RAD concluded that the RPD did not err in its decision that the Applicant and his family were neither Convention refugees nor persons in need of protection.

II. Issues

[14] The parties raise various issues which may be rephrased as follows:

1. What is the standard of review for the RAD's decision?
2. Did the RAD err in rejecting the new evidence under subsection 110(4) of the *Act*? and
3. Was the RAD's decision reasonable?

III. Analysis

A. *What is the standard of review for the RAD's decision?*

[15] The standard by which this Court should review the RAD's determination about the scope of its review of RPD decisions remains unsettled. This issue is before the Federal Court of Appeal.

[16] In the meantime, a pragmatic approach to the issue (see: *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at paragraphs 46-52, 465 FTR 114) suggests that the RAD's decision in this case should be reviewed on a standard of reasonableness (see: *Sisman v. Canada (Citizenship and Immigration)*, 2015 FC 930, 257 ACWS (3d) 421). The RAD's assessment of the evidence before it is entitled to deference by the Court (see: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Yin v Canada (Citizenship and*

Immigration), 2014 FC 1209 at paragraph 34, 248 ACWS (3d) 422; *Mojahed v Canada (Citizenship and Immigration)*, 2015 FC 690 at paragraph 14, 255 ACWS (3d) 687). The RAD's decision should not be disturbed, therefore, so long as it is justifiable, intelligible, and transparent, and defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708).

B. *Did the RAD err in rejecting the new evidence under subsection 110(4) of the Act?*

[17] Except when responding to evidence introduced by the Minister, a refugee claimant can only present new evidence to the RAD when permitted by subsection 110(4) of the *Act*, which provides that:

110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**110 (4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[18] The test for admitting new evidence under subsection 110(4) of the *Act* raises a question of statutory interpretation, a task which "requires that the words of an Act be interpreted 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the

Act, the object of the Act, and the intention of Parliament' " (*Imperial Oil v Jacques*, 2014 SCC 66 at paragraph 47, [2014] 3 SCR 287). To date, this Court has applied the reasonableness standard of review to this question, essentially because it is a question involving the RAD's home statute and is not of central importance to the legal system (see: e.g., *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 at paragraphs 39-42, [2015] 3 FCR 587 [*Singh*]; also see *Denbel v Canada (Citizenship and Immigration)*, 2015 FC 629 at paragraph 29, 254 ACWS (3d) 915 [*Denbel*]).

[19] In this case, the RAD looked to the literal provisions of subsection 110(4) of the *Act* in assessing the new evidence, asking itself two questions with respect to the new evidence; namely, (1) did the evidence arise after the rejection of the claim and was not reasonably available at the time of the rejection; and (2) was the evidence such that the Applicant could reasonably have been expected in the circumstances to have presented it at the time of the rejection?

[20] I can find no fault with the RAD's approach to the assessment of the new evidence in this case. Its interpretation of subsection 110(4) was one which can be justified on the reasonableness standard (see: *Tota v Canada (Minister of Citizenship and Immigration)*, 2015 FC 890, at paragraphs 33 to 53, 257 ACWS (3d) 188). Thus, the question becomes one of whether the RAD's application of this subsection to the evidence before it was reasonable?

[21] The Applicants argue that the criteria for new evidence emanating from *Raza v Canada (Immigration and Citizenship)*, 2007 FCA 385, 162 ACWS (3d) 1013 [*Raza*], should not be

applied and, consequently, under the flexible approach adopted by this Court in *Singh*, the new evidence was probative for the purposes of subsection 110(4) and should have been admitted and considered by the RAD. The Applicants say they should have been granted some "leeway" by the RAD to address the deficiencies raised at the RPD hearing.

[22] The Respondent argues that *Singh* does not allow for "unlimited leeway." In this case, there was eight months between the Applicants' claim being made and the hearing date, and some fourteen months between the claim and the RPD rendering its decision. The Respondent also asserts that it was reasonable for the RAD to prefer *Denbel*, which looks to the *Raza* factors when assessing new evidence, over the flexible approach adopted in *Singh*.

[23] I agree with the Respondent that the Court's decision in *Singh* does not afford the Applicant unlimited leeway to address the numerous deficiencies in his claim as found by the RPD. Unlike *Singh*, where the applicant there sought to adduce just one document - a high school diploma, to show that the RPD wrongly believed that it had not been confiscated and to substantiate a fact that the applicant had studied with a friend until a certain date - the Applicant in this case has adduced numerous documents which the RAD reasonably rejected as being new evidence.

[24] Even if it might be said, as the Applicant does, that the RAD's rejection of the bankbooks of the Applicant's parents as new evidence was not reasonable because these documents address the RPD's concern about the absence of evidence to show cancellation of the Applicant's parents' pensions, it was reasonable for the RAD to determine that this issue had been addressed

at the RPD hearing. Moreover, this evidence which was not before the RAD does not prove that the pensions were cancelled because of the Applicant's practice of Falun Gong.

[25] It was reasonable for the RAD in this case to find that, prior to the Applicant's hearing before the RPD some eight months after making the claim for refugee protection, the Applicant and his counsel could and should have gathered together or made inquiries about relevant documents such as the summons. Unlike the applicant in *Singh*, the new evidence sought to be adduced by the Applicant here was within his control and he had sufficient time and opportunities to provide the new documentation prior to the RPD rendering its decision.

[26] The nature of the new evidence sought to be adduced by the Applicant in this case was such that, if accepted by the RAD, the hearing before the RPD would have amounted to little more than a test case for the Applicant's claim. Moreover, accepting the Applicant's arguments as to the "leeway" which the RAD should afford to new evidence to overcome or address concerns or deficiencies in the evidence before the RPD would, in my view, open the door too widely and possibly encourage a claimant to, in effect, split their claim for protection. Whatever else an appeal to the RAD should be, it should not be tantamount to another full-blown hearing before the RAD, something which is best left to the RPD.

C. *Was the RAD's decision reasonable?*

[27] The Applicants argue that, in view of the evidence before the RAD, its negative credibility finding was unreasonable, and that it unreasonably concluded that the Applicant was not a genuine Falun Gong practitioner. They also argue, amongst other things, that it was absurd

for the RAD to refuse to admit the new documentary evidence, and then to use the lack of documentation as undermining the Applicant's credibility. The Applicants further argue that the RAD's determinations about the failure to claim in the US and their exit from China were unreasonable. I find no merit in any of these arguments of the Applicants. The RAD's decision to reject these arguments is one well within the scope of reasonable outcomes.

[28] It is clear upon review of the RAD's reasons for its decision that it conducted its own assessment of the Applicant's claim based on the evidence that was before the RPD. The RAD reviewed the recording of the RPD hearing and the documentary evidence before the RPD and reasonably concluded, as did the RPD, that the Applicant is not a genuine Falun Gong practitioner. This conclusion, in itself, was dispositive of the Applicants' appeal.

[29] Moreover, it cannot be said that the RAD's findings were either perverse, capricious, or made without regard to the evidence. The RAD was entitled to draw adverse inferences from the Applicants' failure to make a claim in the US and their ease of exit from China, and also to make negative credibility findings based on their failure to provide expected supporting documentation in a timely manner.

[30] The RAD's decision should not be disturbed, therefore, because it is justifiable, intelligible, and transparent, and defensible in respect of the facts and the law. The RAD's reasons for its decision are clear and enable the Court to understand why it made the decision it did in this case.

IV. Conclusion

[31] In the result, therefore, the Applicants' application for judicial review is dismissed. No question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, and that there is no question of general importance for certification.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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