

Federal Court



Cour fédérale

Date: 20170106

Docket: IMM-2310-16

Citation: 2017 FC 19

Ottawa, Ontario, January 6, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JIANJUN WANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Jianjun Wang [the Applicant] seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada dated May 10, 2016 [Decision]. The RPD determined that the Applicant lacked credibility and was not a Convention refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD also determined that

there was no credible basis for the Applicant's claim, pursuant to subsection 107(2) of the *IRPA*, thereby foreclosing any appeal to the Refugee Appeal Division.

[2] The Decision was rendered on the basis of lack of credibility. The basis for the Applicant's claim was that she feared the Public Security Bureau [PSB] and claimed they were searching for her because she was a member of the Church of Almighty God [Church] in China. The RPD found that the Applicant fabricated her story of membership in the Church and therefore there was no credible evidence by which the RPD could conclude that the Applicant reasonably feared persecution in China.

[3] The RPD also found that a *sur place* claim made by the Applicant failed because her small role in a volunteer movie made in Toronto by the Church would not cause her to be perceived by Chinese authorities as an Almighty God practitioner. The RPD found that the *sur place* claim was made in an effort to advance the Applicant's refugee claim which it determined was a fraudulent claim with no credible basis.

[4] The Applicant argues that the RPD's credibility findings were unreasonable and that the RPD conducted a microscopic examination of her evidence. She argues that the RPD conducted the hearing in a confusing manner and then misinterpreted her confusion as contradictory testimony. She also challenges the finding that there was no credible basis for her claim. She asks that the Decision be set aside and the matter be remitted to a differently constituted panel for reconsideration in accordance with such directions as the Court considers appropriate.

[5] The Respondent says the panel had to verify the Applicant's story about the PSB because it was material to her claim and the RPD reasonably inquired into the details of her allegation

that the PSB was searching for her. The Respondent says she showed a lack of knowledge of her faith and it was her own failure to provide credible and trustworthy evidence that led to the finding that there was no credible basis for her claim. The Respondent submits the Applicant was not confused by the RPD's questioning, as she alleges. Rather, she was evasive and changed her story several times. The Respondent submits the finding by the RPD that the Applicant changed her evidence in response to questions was a reasonable finding.

[6] Having considered the arguments of the parties, made both in writing and at the hearing, and after reviewing the materials filed in support and significant parts of the transcripts of the hearing, it is my view that the RPD erred in several conclusions it reached. The effect of those errors is significant enough that it is not possible to determine whether the outcome would have been the same had the errors not occurred. Therefore, as further explained in the reasons that follow, this application is allowed.

II. THE DECISION UNDER REVIEW

[7] The Applicant's refugee claim was initially heard by the RPD over three dates: August 12, September 1 and September 15, 2015. Later, the RPD determined that more evidence was necessary to properly evaluate the Applicant's *sur place* claim, and the hearing was re-convened on March 3, 2016. Ultimately, there was insufficient time to hear oral submissions addressing the *sur place* claim on that date, so the Applicant's counsel was instead invited to make written submissions on that issue.

[8] The Decision addresses the Applicant's claims about fearing the PSB, looks at omissions from her basis of claim form [BOC] and answers she gave to questions asked by the RPD about contradictions the panel perceived with her evidence. The Decision also addresses a perceived

contradiction and implausibility that was found by the RPD to exist concerning the Applicant's claim to have viewed a video online in China. The RPD determined that the "Golden Shield" computer system in China would have made that viewing impossible. The RPD rejected an attempted clarification by the Applicant that she did not view the video online but rather saw it using a memory card with an MP4 or MP5 player.

[9] The Applicant's *sur place* claim was based on a small role she had as a fictional character in a movie made in Toronto by volunteers who were members of the Church. The movie was about a pastor from another religion converting to the Church. The Applicant alleges the movie will be seen by the authorities in China who will then know she is an Almighty God Practitioner. The RPD determined that a letter written by members of the film crew and submitted to confirm the Applicant made the movie with them would be given little weight because the signatories did not have much contact with the Applicant and did not know her well. The RPD was also concerned that the letter was unsworn and none of the signatories attended the hearing to provide evidence.

[10] In finding that the Applicant's stories were not credible, the RPD determined her testimony was undermined by evasiveness, contradiction, inconsistency and implausibility.

Specifically, the RPD rejected each of the Applicant's claims and then concluded that:

[70] While none of the credibility concerns raised may be sufficient, each on their own to negate the claim, the cumulative effect of all of them is that the panel did not have sufficient credible and trustworthy evidence upon which to base a determination that the claimant is a Convention refugee or a person in need of protection.

[71] Pursuant to subsection 107(2) of the *Immigration and Refugee Protection Act*, the panel finds that there was no credible or trustworthy evidence on which it could have made a favourable decision, and finds that there is no credible basis for the claim.

III. ISSUES AND STANDARD OF REVIEW

[11] There are three issues under consideration in this application:

1. Whether the RPD erred in making the credibility findings;
2. Whether the RPD erred in assessing the *sur place* claim;
3. Whether the RPD erred in finding there was no credible basis for the Applicant's claim.

[12] The standard of review for questions of credibility and assessment of the *sur place* evidence by the RPD is reasonableness: *Li v Canada (Citizenship and Immigration)*, 2011 FC 941 at paragraphs 14-15. Significant deference is owed to findings of credibility by the RPD as it enjoys the advantage of directly observing an Applicant testify: *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 at para 4 (FCA).

[13] A decision is reasonable if the decision-making process is justified, transparent and intelligible and if the resulting decision falls within the 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.

[14] Although the standard of review for finding there is no credible basis for a claim is reasonableness, the threshold faced by the RPD in arriving at that determination is high because the finding removes an applicant's right to appeal to the Refugee Appeal Division. A determination that there is no credible basis for a claim is not reasonable if there is any credible or trustworthy evidence that could support a positive decision: *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 at para 17, citing *Ramón Levario v Canada (Citizenship and Immigration)*, 2012 FC 314.

IV. ANALYSIS

[15] There are two critical errors in the Decision which require it to be sent back for redetermination. One is that the credibility findings are flawed as a result of the way in which the hearing unfolded and the lack of analysis by the RPD of the Applicant's explanations and answers to questions. Those flawed credibility findings also serve to upset the no credible basis determination. The other critical error is that the *sur place* analysis is based on both a faulty implausibility analysis and an unrealistic analysis of whether the authorities in China would have access to a movie placed on the website of the Church.

A. *Problems with the Credibility Findings*

[16] The hearing progressed over several days during which the RPD questioned the Applicant extensively. As she spoke no English, the Applicant testified through an interpreter. She was assisted by Counsel at the hearing. While the Minister intervened on the basis of credibility, he did so in writing only and was not represented at the hearing.

[17] A review of the transcripts indicates the Applicant's testimony was disjointed. One cause was that the RPD often challenged the Applicant about perceived inconsistent answers or non-responsive answers. On some occasions, her answers were inconsistent. On other occasions, however, the RPD appears to have lost track of the original question and incorrectly accused the Applicant of either failing to respond to the question or providing inconsistent answers. The result is that some of the critical findings made by the panel flow from a misapprehension by it of the evidence. As such, the conclusions drawn are not actually supported by the evidence and are thereby perverse.

[18] The RPD relied on the cumulative effect of the negative credibility findings to conclude that it did not have sufficient credible and trustworthy evidence to support the Applicant's claim. It is impossible to discern whether the findings that were supported by the evidence would be sufficient once the findings not so supported are set aside. As a result, it cannot be said that the Decision is justified or intelligible.

[19] While there are several examples of important credibility findings by the RPD that are flawed, two important ones will suffice.

(1) The Hotline Telephone Number

(a) *Was there a Video?*

[20] The Applicant alleged that as soon as she arrived in Canada after fleeing the PSB, she contacted the Church in Toronto using a hotline number she memorized from a video she saw in China. The RPD disbelieved the Applicant had viewed a video in China. It rejected her explanation for what the RPD found to be contradictory evidence as to whether the hotline number was "in the video". The Applicant said the hotline number was "at the end" of the video in a list of gospel hotline numbers for various countries. The RPD rejected the Applicant's explanation that a list of hotline numbers for various countries found "at the end" of the video was not "in the video" saying:

[22] The panel rejects this explanation for her contradictory evidence. It finds that she clearly stated that the hotline number was in the video, and then changed her evidence when asked to explain it. It finds her explanation that "at the end" did not mean in the video does not overcome her testimony that the hotline number was in the video. It finds that the claimant failed to provide a reasonable explanation for her conflicting evidence. The panel finds that this contradiction undermines her credibility. It also undermines her testimony that she saw the hotline number in a video. This finding also undermines her explanation with respect to

how she was able to make contact with the alleged Almighty God house church in Toronto.

[21] There are two problems with this analysis. Firstly, in my view, this distinction of “in the video” versus “at the end” of the video is not an inconsistency as much as it is a focus by the RPD on minutiae rather than the evidence as a whole. Contrary to the RPD’s view, the Applicant did not contradict herself on this point. She stated that there was no “information about Canada” or about the Canadian house church in the video, but that the end of the video included gospel hotline numbers for a number of countries including Canada. While the RPD might consider a video’s credits to be a part of the video, it was not unreasonable for the Applicant to phrase the matter differently. The important question is whether the hotline number was available to those who watched the video, and on this point the Applicant was consistent.

[22] The questioning surrounding the hotline number began with a simple question by the RPD and what appeared to be a simple answer:

Member: How did you know that there was an Almighty God church in Toronto and that they have a hotline number?

Claimant: Because the Almighty God church had made some videotapes. And in this . . . In those videotapes, there were information about the hotline phone numbers.

(Certified Tribunal Record, page 774, lines 38-41)

[23] When the questioning continued there was an attempt by the RPD to clarify whether it was the church in Canada or the church in China that made the videotape:

Member: Yeah. My question was which church made the video, the Canadian ... the Canadian house church or the ... sorry. Did ... which ... which church made the video? Was it the Canadian church or a ... the Chinese church?

Claimant: The China one.

Member: And in the video you're saying that there was some information about the Canadian church?

Claimant: There is no information about Canada in this video.

Member: Okay. I want to listen to the record, okay? 'Cause we went off the record and the computer went down. I don't even have notes. I have a recollection of what was said. So shall we just go and (inaudible) . . .

OFF THE RECORD –

ON THE RECORD –

Member: Okay. So we're back on the record. Okay. Ma'am, so I'm just going to draw to your attention two answers that are contradictory. You said that the Chinese church made the video and in the video there was information about Canada and you gave that answer in response to my question, how did you know about the church in the hotline numbers? Then you said there is no information about Canada on the video. Can you please explain your different answers?

Claimant: In this video, there is indeed no information about Canada, but . . . but at the end of the video there were gospel hotline's of different countries.

Member: Yes?

Claimant: My understanding is at the end of the video is not . . . is . . . not in the content of the video.

Member: Why would you think that, ma'am, if it's in the video?

Claimant: That is my understanding.

Member: Did you call that number, that Canadian number, while you were in China?

Claimant: No.

(Certified Tribunal Record, page 775, line 38-page 776, line 34)

[24] Reference to the hotline number for the Church in Toronto was not in the Applicant's BOC. The RPD questioned her about that "omission":

Member: My question is why didn't you mention in your BOC that you had seen a video in China that included information about Canada and the ...the Almighty God church in Canada including the ... the hotline number here, that you had memorized the number and that it was your intention when you left China to come to Canada and to contact the Almighty God church using the hotline number? Why was none of this in your Basis of Claim form?

Claimant: When I wrote the story, I wrote the reasons for my coming to Canada. And I wrote the account of the reasons and the threat I received in China.

[25] In rejecting this explanation the RPD said:

[25] The panel rejects this explanation. It finds that the claimant travelled to Canada with the intention of contacting an Almighty God house church in Toronto through their hotline number after allegedly seeing the phone number in a video in China. The panel finds this testimony is material with respect to her allegation that she was able to find and join an Almighty God house church in Toronto. It finds that the claimant was unable to provide a reasonable explanation for omitting this information from her BOC. This finding undermines the claimant's allegation that she saw a Toronto hotline number in a video in China, and that she used it to locate the alleged house church in Toronto.

[26] With respect it is not clear how the explanation provided by the Applicant, which is that her BOC dealt with her fear of persecution because two other practitioners had been arrested, is not a reasonable answer as to why she did not include the fact that she knew the telephone hotline number for the Church in Toronto. The Claimant's Guide explains that the BOC is:

The form in which you give information about yourself and about why you are claiming refugee protection in Canada.

[27] The BOC instructions under section 2—“Why You are Claiming Refugee Protection”—would not in my view lead an Applicant to include a telephone number for a local contact in Canada. The focus is not on what a claimant will do upon arrival in Canada. It is on why the claimant left to seek refugee protection in Canada.

[28] On a plain reading of the BOC, the Guide and the Instructions for Completion, there is no reason for a claimant to include information concerning what they will do in Canada once they flee their country of origin. The whole *raison d'être* for the BOC is to enable a claimant to explain why they need to flee and what threats or harm they have experienced that led them to seek refugee protection. The existence of a telephone hotline number in Canada for the Church does not address any of the threats of harm or reasons for seeking refugee protection and leaving China. It addresses how the Applicant intended to integrate once she arrived in Canada.

(b) *The Golden Shield Analysis is Incomplete*

[29] Part of the reason the RPD rejects the Applicant's explanation may lie in the fact that the RPD believes there was no such video because it rejected the notion that the Applicant could have watched a video online in China. The panel found that given China's strict internet surveillance and censorship—including the Golden Shield Project which is a sophisticated surveillance system—it was implausible that the Applicant could view online a video produced by what China considered to be, as put by the RPD, “an evil cult”.

[30] A critical component of the RPD's analysis is the finding that the Golden Shield would absolutely prevent the posting of an online video in China. In arriving at that conclusion, the RPD consulted the National Documentation package of October 2015 concerning censorship and surveillance in China. It also quoted from a Response to Information Request [RIR] dated March

7, 2014, in which the Laogai Research Foundation stated that “the physical structure of Chinese cyberspace forces virtually all internet contact between China and the outside world to pass through three chokepoints’ where the authorities monitor all transmitted information”. On that basis the RPD found it implausible that there could be “on-line videos, and on-line traffic from a banned religion in China to international destinations and back again to China”. However, later in the same paragraph the RIR states that “Freedom House writes that ‘[f]iltering is heterogeneous and often inconsistent, depending on timing, technology, and geographical region’ (July 2013, 20).” This evidence that the Golden Shield’s filtering may be “inconsistent” was not acknowledged by the RPD and was not discussed in the Decision.

[31] The RPD concludes that bypassing the surveillance, or going “over the wall” as the Applicant calls it, is so implausible that the Applicant must be fabricating her testimony. That is a serious allegation. At the hearing, the RPD spent a lot of time questioning the Applicant about where she viewed the video and how it got out of China to be vetted and then returned back to China. By ignoring the important qualifiers noted by Freedom House that show the Golden Shield is not as all-encompassing or infallible as the RPD stated it was, the RPD failed to sufficiently consider whether the underlying facts upon which it based that finding of credibility were sufficiently supported by the documentary evidence upon which it relied: *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paras 9-11.

[32] For the foregoing reasons, the finding by the RPD that there is no video and that the Applicant could not have watched the video on the internet, despite her testimony that she watched on an MP4 or MP5 player in China, is unreasonable.

(2) The Letter from the Church in Toronto

[33] Ultimately, the RPD found no video or hotline number existed in a video in China. As a result, the panel found the Applicant was unable to provide a reasonable explanation with respect to how she was able to make immediate contact with the house church in Toronto. In a paragraph entitled “Hotline Number in Church Letter”, the RPD rejected out of hand a letter from the Toronto house church dated July 24, 2015, signed by Ting Lin who said he was a leader of the Church of Almighty God in Canada. The letter confirms the Applicant is an active participant in the Church and that she first contacted them on May 6th “through the Church of Almighty God’s phone hotline”. The RPD, having found there is no such hotline because there was no video, finds that mention of the hotline number in the letter is “problematic and undermines the reliability and trustworthiness of the information it contains”. It therefore not only assigned little weight to the letter, it also said that “these findings undermine the [Applicant’s] credibility and the trustworthiness of her *sur place* claim”. It is not clear in the Decision which findings the RPD is referring to nor why they should affect the *sur place* claim.

[34] The immediate problem with the determination by the RPD that there is no hotline number is that the RPD’s conclusion is unsupported by any analysis or explanation. There are a series of implausibility findings. Rather than accept the letter from the Church leader as supporting the Applicant’s claim that she memorized and used the hotline number, the RPD first found the existence of an online video to be implausible, then rejected the Applicant’s clarifying statement that she saw it not on the internet but on an MP4 or MP5 player and then finally concluded that the Church letter was untrustworthy because it also mentions the hotline number. This kind of reasoning process was most recently rejected by Mr. Justice Boswell in *Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 who found at paragraph 25 that “the RPD

has to deal separately and squarely with the documentary evidence before coming to an overall credibility finding” [emphasis in original]. The RPD did not deal separately with the Church letter. It made a series of rolling credibility findings, each following and justifying the other. The resulting finding is unreasonable as it dismisses the independent evidence of the Church letter based on prior credibility findings and not because of a separate analysis of the letter itself.

B. *Sur Place Claim*

[35] The RPD found that the *sur place* claim was made by the Applicant “to advance her fraudulent refugee claim.” The RPD then concluded that the Applicant’s “participation as an actress in a small, fictional role in a volunteer made movie in Toronto would not cause her to be perceived as an Almighty God practitioner by the Chinese authorities.” There is no analysis or explanation of how this conclusion was reached by the RPD. It started with the observation that the Applicant was not an Almighty God practitioner and then went straight to the finding that appearing in the movie would not cause her to be perceived as an Almighty God practitioner. In that respect the RPD wrongly used the negative credibility it made in considering the refugee claim to dismiss the *sur place* claim.

[36] In answering a question from the RPD as to how the movie would be seen by Chinese authorities the Applicant said she expected it would be posted on the Church’s website. She acknowledged that the authorities would have to look for the film on the internet to find it. The RPD concluded that, on a balance of probabilities, the movie would not come to the attention of the authorities as the Applicant’s evidence about how they would learn about the movie was “speculative”. It is incredible and, unreasonable, that the RPD, having asked the Applicant to speculate as to how the authorities would discover the movie, then uses the answer she gave to

undermine her *sur place* claim by finding the movie would not come to the attention of the authorities because her evidence in that regard was speculative.

[37] Having accepted that the movie would be posted on the Church website, the question was not whether the Applicant had personal knowledge about the Chinese government's ability and desire to find the video. Rather, the task for the RPD was to analyse the objective country condition evidence to determine whether there was a serious possibility of the video coming to the attention of the Chinese authorities and of the Applicant's participation in the video causing her to be persecuted if returned to China.

[38] The RPD had already concluded that the Chinese authorities consider the Almighty God church an evil cult and that it would censor any videos promoting that cult. There is no explanation for why the Chinese government is interested enough in the Church to censor its videos but would not monitor those same videos to gather intelligence on which individuals are members of the Church. Had the RPD engaged in any analysis of the issue, it could have concluded that the Applicant would come to the attention of the authorities through the Almighty God video. This is particularly so as the RIR of March 7, 2014, indicates that the Chinese authorities have extensive tracking mechanisms which include facial recognition technology. Admittedly, the RPD might also have come to a different conclusion. Unfortunately without any intelligible analysis on the issue, the Court is unable to determine whether the RPD's conclusion falls within the range of possible, acceptable outcomes that are defensible on the facts and law.

V. CONCLUSION

[39] I return to the conclusion reached by the RPD that none of the credibility concerns on their own were sufficient to negate the Applicant's claim but the cumulative effect of all of them

meant there was not sufficient credible and trustworthy evidence to ground a claim. I note that the RPD therefore also found under subsection 107(2) of the *IRPA* that there was no credible basis for the claim. I have determined that several of the credibility findings were flawed and not supported by the analysis or reasons given in the Decision. It follows that the cumulative effect of all such findings no longer exists and the Decision must be set aside both with respect to the negative findings under section 96 and subsection 97(1) of the *IRPA* and the consequential finding of no credible basis under subsection 107(2).

[40] Turning to the appropriate remedy, I believe this is a case where I must go beyond the normal order that the matter be redetermined by a differently-constituted panel. The Immigration and Refugee Board's *Policy on Court-Ordered Redeterminations* states that where no breach of natural justice is found and there are no directions to the contrary, the redetermination case file will contain the transcripts of the previous hearing. While the Applicant did not argue a breach of procedural fairness, I have concerns about the way that the RPD, on multiple occasions, lost track of its question and then challenged the Applicant on non-existent contradictions or evasiveness. I believe that the transcripts would be more likely to hinder than help the fact-finding process when the redetermination is heard. They should therefore be excluded from the redetermination case file.

[41] The application is allowed and the matter is returned to the RPD for re-determination by a different panel member and without the transcripts of the previous hearing in the redetermination case file. Neither party posed a question for certification and I find that none exists on the facts.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed. The matter is returned to the Refugee Protection Division of the Immigration and Refugee Board for redetermination by a different panel member. The transcripts of the previous hearing shall be excluded from the redetermination case file. There is no serious question of general importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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