

Federal Court



Cour fédérale

Date: 20181203

Docket: IMM-2934-18

Citation: 2018 FC 1210

Ottawa, Ontario, December 3, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HONGYU ZHANG

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division [the RPD], dated May 9, 2018, determining that the Applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicant, Hongyu Zhang, was born on February 2, 1961 in Tieling, Liaoning, China. He has a wife and a daughter, both of whom continue to reside in China. The Applicant fears persecution in China due to his practice of Falun Gong.

[3] The Applicant alleges that he began to practice Falun Gong while in China. He first practiced Falun Gong at home in December 2010, before beginning to attend a practice group in January 2011.

[4] According to the Applicant, on the evening of August 17, 2012, members of the Chinese Public Safety Bureau [the PSB] raided the Applicant's practice group. The Applicant was not present during the raid, as he was at work as a supervisor at Tieling City Food Company, but he received a phone call from a fellow practitioner advising him of the raid. The Applicant claims that he left work immediately and went into hiding at a cousin's house for the next three and a half months. On December 3, 2012, with the help of a smuggler who arranged a Canadian visa, the Applicant exited China using his own passport and came to Canada.

[5] The Applicant filed an application claiming Canada's protection on December 23, 2012.

[6] The Applicant and his counsel attended a hearing before a Member of the RPD on April 13, 2018 [the Hearing]. The Applicant, by way of an interpreter, answered questions from his counsel and the Member.

[7] In a decision dated May 9, 2018, the RPD found that the Applicant was not a Convention refugee and was not a person in need of protection, and therefore rejected the Applicant's claim for refugee status [the Decision].

[8] The overriding issue before the RPD was the Applicant's credibility. The RPD rejected several parts of the Applicant's testimony, which led to the conclusion that the Applicant had failed to establish that he was at risk in China due to his participation in Falun Gong activities.

III. Issues

[9] The issues are:

- A. Whether the credibility determinations made by the RPD in relation to the following points were reasonable:
 - i. The Applicant's motivation to practice Falun Gong;
 - ii. The Applicant's actions following the PSB raid on his practice group;
 - iii. The condition of the Applicant's Falun Gong texts; and
 - iv. The Applicant's exit from China using his own passport.
- B. Whether the RPD's finding that the Applicant had not established a *sur place* claim was reasonable.

IV. Standard of Review

[10] The standard of review is reasonableness.

[11] However, this decision contains both true credibility findings and implausibility findings. Although both are reviewed on the reasonableness standard, while credibility findings should be accorded great deference on judicial review, implausibility findings are subject to greater scrutiny and require a clear explanation.

[12] Implausibility findings should only be made in the clearest of cases, where the facts presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened, or where the documentary evidence before the tribunal demonstrates that the events could not have happened in the manner asserted by the claimant (*Sun v Canada (Citizenship and Immigration)*, 2015 FC 387 at para 26 [*Sun*], citing *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7 [*Valtchev*]). While the Respondent argues that the higher standard of analysis suggested by *Valtchev* should be tempered in view of *Dunsmuir v New Brunswick*, 2008 SCC 9, the *Valtchev* framework remains good law before this Court and I see no reason to depart from it. While the Respondent argues this higher standard of analysis should be tempered in view of *Dunsmuir*, when a tribunal repeatedly refers to the implausibility of evidence, meaning the unbelievability or improbability of that evidence, the Court must look at those findings with some heightened scrutiny.

V. Analysis

A. *Whether the credibility determinations made by the RPD in relation to the following points were reasonable.*

[13] The Applicant testified that he began practicing Falun Gong in an attempt to alleviate his gastric ailments. He testified that while his doctor at the Tieling City Traditional Chinese Hospital [the Hospital] told him to stop drinking alcohol and smoking tobacco, it was not until he began practicing Falun Gong that he was able to stop drinking and smoking.

[14] The RPD was not convinced that it was the practice of Falun Gong that enabled the Applicant to stop drinking and smoking, because

- a) While the Applicant testified that the Hospital was a western medicine hospital, the Applicant's medical booklet indicated that it was a traditional Chinese hospital; and
- b) Given that the Applicant was motivated to attend a traditional hospital, the RPD inferred that he would also be motivated to follow his doctor's instructions to stop smoking and drinking.

[15] The Applicant argues that the RPD's finding that the Hospital was a traditional hospital was based solely on its name, and that further it is clear from the Applicant's medical booklet that the Hospital was a western hospital because the Applicant was receiving prescriptions for antibiotics and anti-inflammatory drugs.

[16] The Respondent submits that the inclusion of the word “traditional” in the Hospital’s name offers some support for the inference that it is a traditional medicine hospital. Additionally, the Applicant’s medical record does not evidence receiving a prescription for western medicine drugs, but rather that he is seeking treatment from his doctor because he took western drugs but showed no improvement.

[17] While it may have been reasonable for the RPD to conclude that the Hospital was a western hospital, I fail to see how this offers the RPD a reasonable basis to reject as implausible the Applicant’s testimony that the practice of Falun Gong allowed him to stop drinking and smoking.

[18] As Justice de Montigny decided in *Sun*, above, at paragraphs 21 and 24:

[21] I agree with counsel for the Applicant that it was irrelevant whether the “miracle” of the Applicant’s cure actually occurred. The Board may not have shared the Applicant’s belief that God was at the source of his medical recovery, but this does not mean that the Applicant does not sincerely believe it himself and is not a practicing Christian that may be subject to persecution. The Applicant explained that he stopped taking his medication in April 2010 and prayed, and that this was why he believed that God caused his recovery in May 2010. With respect, I fail to see how this explanation is vague or evasive. It clearly addressed the Board’s question, and it is not incoherent. It may not have been enough to convince the Board member to convert to Christianity himself, but that is not the point. A refugee claimant is evidently not required to prove divine intervention to demonstrate his fear of religious persecution, and it is not the Board’s role to make findings of fact on miracles.

...

[24] ...I am concerned that the Board’s analysis was coloured by its skepticism with respect to the Applicant’s allegation that he was miraculously cured. Instead of assessing the sincerity of the Applicant’s belief and the veracity of his story concerning the

church raid, the Board gave undue weight to minor details, found inconsistencies in perceived discrepancies that were reasonably explained by the Applicant, and questioned his faith on the basis of other people's behaviour for which he could not be held responsible.

[Emphasis added]

[19] Similarly here, the RPD was unwilling to accept the Applicant's testimony that the practice of Falun Gong allowed him to stop smoking and drinking, and searched in vain for reasons to reject this testimony. That the Applicant may have received treatment at a traditional hospital, and then failed to follow his doctor's recommendations, is an insufficient reason to find the Applicant's testimony implausible.

[20] Much of the remainder of the RPD's analysis is coloured with the same skepticism, which caused the RPD to look for minor details upon which to reject the Applicant's testimony.

[21] The Applicant also testified that he had never before left work before the end of a shift. However, when he received the phone call alerting him to the raid on his practice group on the evening of August 17, 2012, he left work immediately without telling anyone, despite being scheduled to work until 4:00 am. The Applicant testified that he never returned to work after that night.

[22] The RPD questioned the Applicant on how, as a supervisor, he was able to walk off the job without arousing suspicion. The Applicant testified that because he was a supervisor and it was a night shift, he was able leave without arousing suspicion.

[23] The RPD concluded that the Applicant's actions would have aroused "instant concern, if not suspicion". The RPD based this finding on:

- a) The Applicant's testimony that as a supervisor part of his role was to address any issues that staff may have, and therefore it was unlikely that his absence would go unnoticed by his staff;
- b) The incoming shift supervisor would also have noticed the Applicant's absence; and
- c) The Applicant's failure to return to work for subsequent shifts would also have excited suspicion.

[24] Having found that the Applicant's actions would have aroused suspicion, the RPD reasoned that the Applicant would have wanted to avoid this suspicion if he were going into hiding, and therefore rejected the Applicant's testimony regarding his actions following the raid on his practice group.

[25] I find that the RPD rejected the Applicant's testimony based on unreasonable speculation. The RPD speculated about the conditions that may exist during a night shift at a factory in Tieling, China, and then used this speculation, and nothing more, to reject the Applicant's testimony. The RPD's conclusion that the Applicant's testimony lacks plausibility is unreasonable.

[26] The Applicant also brought two paperback Falun Gong books to the Hearing, which he claimed to use on a daily basis as part of his practice. The Applicant testified that he had bought the books over a year ago, after his previous texts were defaced by a friend. In response to a

question by the Member as to why the books looked so new, the Applicant testified that he washed his hands before handling them because the books were “Master’s law body, every character is Master’s law body, cannot make it dirty.”

[27] The Member found that that the books did not show the wear and tear associated with daily use of a paperback, and therefore did not support the Applicant’s testimony that he used the books on a daily basis.

[28] The Member also found that if the Applicant had been practicing Falun Gong since December 2010 as he claimed, he would no longer require the use of one of the books, a “how-to exercise manual”. The Member did not question the Applicant about why he possessed such a text.

[29] The Member concluded, based on these two findings, that the Applicant’s credibility was seriously undermined by his claim that he used the two books to facilitate his practice of Falun Gong.

[30] While the Applicant did provide an explanation for the condition of the texts – that he washed his hands before handling them – it was reasonably open to the RPD to conclude that the books were too new to support daily use. Such a finding by the trier of fact should be accorded significant deference.

[31] However, the RPD was unreasonable to go on to conclude, without further explanation, that the Applicant would not require a “how-to exercise manual” if he been practicing Falun Gong since 2010. The Member did not question the Applicant about why he possessed such a text, and there was no evidence before the Member that an experienced practitioner would not possess such a text.

[32] I find that it was unreasonable for the Member to make an adverse credibility finding on the basis that the Applicant would not possess a “how-to exercise manual”.

[33] The Applicant also testified that the PSB visited his home three times. On the first two occasions the PSB appeared with a summons; on the third occasion, November 26, 2012, they showed the Applicant’s wife a warrant for his arrest. The Applicant was unable to produce a copy of the warrant, although he did produce a copy of the summons, the verity of which was not questioned by the Member. The Applicant also testified that he used his own passport to exit China on December 3, 2012, with the assistance of a smuggler, and that they were not stopped by border officials.

[34] The RPD wrote that “[i]t should be noted that the claimant left China some two weeks after the warrant for his arrest had allegedly been issued.” The Applicant actually left China seven days after the PSB allegedly showed the Applicant’s wife a warrant for his arrest on November 26, 2012. There was no evidence before the RPD as to when the warrant was issued.

[35] The RPD reviewed the country specific evidence relating to the Chinese Golden Shield, a system designed in part to prevent Chinese citizens from exiting China if they are wanted by the authorities. The RPD noted that, while there are exceptional cases, it is difficult for Chinese citizens to circumvent exit control procedures.

[36] After reviewing the country specific evidence and the Applicant's testimony, the RPD concluded:

The PSB had at least two weeks to issue the warrant for his arrest and to input the data into the national computer system.
Accordingly, the panel is not persuaded that the claimant would have been able to exit China using his own genuine passport, as he claims he did, if he were indeed wanted by the PSB.

[Emphasis added]

[37] The Applicant challenges the RPD's conclusion on the basis that it was unreasonable, in light of the documentary evidence before the RPD of rampant corruption among border officials, to reject the Applicant's testimony that he exited China using his own passport. The Respondent submits that the RPD was reasonable to rely on documentary evidence demonstrating the effectiveness of the Golden Shield system.

[38] The RPD's conclusion regarding the difficulty of exiting China when wanted by authorities is justifiable when considered in isolation, as it is supported by the documentary evidence. Additionally, when questioned by the Member, the Applicant provided no meaningful explanation for how he was able to pass through the border controls unimpeded; there was no suggestion that the border officials had been bribed, or any other potential explanation.

[39] However, the RPD's conclusion is mistakenly premised on a belief that the Applicant exited China two weeks, rather than seven days, after a warrant for his arrest was shown to his wife. While this mistake may not result in a reviewable error in isolation, it offers further support for the conclusion that a redetermination is necessary in light of the unreasonable implausibility findings discussed above.

[40] While not every error committed by the RPD constitutes a reviewable error, in this case the cumulative errors of the RPD go to the heart of the matter. As the RPD stated, the Applicant's credibility is "the dominant or overriding issue" in this matter. The RPD erred by making several implausibility findings unsupported by the evidence, as well as by mistaking a key fact. These errors led to adverse findings of credibility which are inextricably woven into much of the rest of the RPD's analysis. The RPD's analysis also appears to be coloured by skepticism with respect to the Applicant's religious beliefs, which caused the RPD to give undue weight to minor inconsistencies in order to reject the Applicant's testimony.

B. *Whether the RPD's finding that the Applicant had not established a sur place claim was reasonable.*

[41] The RPD reviewed the Applicant's testimony, as well as two photographs allegedly showing the Applicant practicing Falun Gong in Toronto, and concluded that the Applicant had failed to establish that he has been a genuine Falun Gong practitioner since coming to Canada. This finding is largely based upon the RPD's other credibility determinations. As I have found some of the RPD's other credibility determinations to be unreasonable, its conclusion regarding the Applicant's *sur place* claim must also be returned for redetermination.

JUDGMENT in IMM-2934-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed, and the matter is remitted back to a different Panel for reconsideration;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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