

Federal Court



Cour fédérale

Date: 20190226

Docket: IMM-3675-18

Citation: 2019 FC 230

Ottawa, Ontario, February 26, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

XIANXIANG WEI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision refusing a refugee application pursuant to sections 96 and 97 (1) of the IRPA.

II. Background

[2] The Applicant, Xianxiang Wei, is a citizen of China and alleges that she began suffering from neurasthenia, insomnia, and other medical symptoms after her husband left her. The Applicant alleges that she sought treatment for these conditions but that the treatment did not relieve her symptoms. A friend convinced her to begin practicing Falun Gong in June 2010. The Applicant alleges that practicing Falun Gong has assisted in relieving her symptoms.

[3] Following her introduction to Falun Gong, the Applicant joined a Falun Gong practice group. In February 2012, the Applicant alleges that two members of the group were arrested by the Public Security Bureau [PSB] while handing out Falun Gong flyers. As a result of the arrests, the Applicant went into hiding and alleges that the PSB came to her house seven times looking for her- three times when she was in hiding and four times after she left the country.

[4] After the PSB came to the Applicant's house, the Applicant alleges that she decided to leave China and hired a smuggler. The Applicant left China on her own passport and stayed in the United States for two and a half months before arriving to Canada.

[5] In Canada, the Applicant made a refugee claim. A decision was rendered by the Immigration and Refugee Board, Refugee Protection Division [RPD] on July 10, 2018, dismissing the Applicant's claim.

A. *Decision under Review*

[6] The RPD ultimately found that the Applicant is neither a Falun Gong practitioner nor is she being pursued by the PSB, that the Applicant made a fraudulent refugee claim, and that the Applicant's credibility was generally in doubt. In reaching these conclusions, the RPD made the following findings:

- i) The PSB did not leave a summons for the Applicant: The Applicant alleged that the PSB visited her home seven times and that the PSB did not leave a summons for her. The RPD noted that the documentary evidence on summonses from the PSB varies depending on the location. Yet, the RPD found that, on a balance of probabilities, considering the number of times the PSB visited the Applicant, that it is reasonable to expect that the PSB would have left a summons. The RPD then drew a negative credibility inference from the lack of summons.
- ii) Warrant for the Applicant's arrest: The Applicant alleged that on April 26, 2012, the PSB showed an arrest warrant to the Applicant's family, two and half months after the PSB's first visit to the Applicant and well after the Applicant left China. The RPD found the time gap extraordinary considering the PSB had arrested two other practitioners, that the PSB notified the Applicant's family that they sought to arrest the Applicant, and that the PSB had visited the Applicant a number of times already. The RPD further noted that the documentary evidence states that a warrant cannot be issued without first preparing a case and applying to the Procurator. The RPD found it would have been reasonable to expect the PSB to have issued a summons against the Applicant. Finally, the Applicant was not able to provide a copy of the warrant. The RPD found on a balance of

probabilities that there was no warrant provided to the Applicant's family and that she was not pursued by the PSB.

- iii) The Applicant left China using her own passport: The RPD noted an inconsistency in the Applicant's response to the question of whether a smuggler made arrangements for her departure from China. At first the Applicant stated that the smuggler did not make any arrangements, and then later when questioned by counsel, she stated that the smuggler did make arrangements and that she did not understand the earlier question. The RPD rejected this explanation, as the earlier answer showed an understanding of the question. The RPD raised documentary evidence which discusses China's Golden Shield Project. The RPD found that as the Applicant's hometown is likely connected to the Golden Shield network, the fact that the Applicant was able to leave China on her own passport further showed that she was not pursued by the PSB and further undermined her credibility regarding the warrant evidence.
- iv) No asylum claim made in the United States: The RPD noted that the Applicant spent two and a half months in the United States without making an asylum claim. The RPD found that the Applicant's reason for not making a claim (that the smuggler advised her that it would be easier to make a claim in Canada) was not a valid reason to negate the adverse inference that the Applicant lacked subjective fear of persecution due to the delay in claiming asylum.
- v) The Applicant's identity as a Falun Gong practitioner: The RPD found the Applicant's knowledge regarding the practice of Falun Gong to be basic, vague and not reasonable for someone who had practiced for six years. The RPD gave little weight to a confirmation letter, as the author was unknown to the RPD and was not a witness at the

hearing. The RPD also gave little weight to the pictures submitted by the Applicant, as anyone can join a Falun Gong practice group. The RPD found that the Applicant was not a Falun Gong practitioner in China, and that she was not being pursued by the PSB. The RPD further found that the Applicant's *sur place* claim failed as the Applicant has not demonstrated that she is currently a Falun Gong practitioner.

[7] Based on these reasons, the RPD dismissed the Applicant's claim, finding that she is neither a Convention refugee nor a person in need of protection.

III. Issues

[8] The issues are:

- A. Did the RPD err by making an improper implausibility finding regarding the Applicant's arrest warrant and the lack of summons?
- B. Did the RPD err by making an improper implausibility finding regarding the Applicant's use of her own passport to exit China?
- C. Did the RPD err by finding that the Applicant's failure to claim in the United States impugned her subjective fear?
- D. Did the RPD err by finding that the Applicant was not a genuine Falun Gong practitioner?

IV. Standard of Review

[9] The parties agree that the appropriate standard of review is reasonableness.

V. Analysis

A. *Did the RPD err by making an improper implausibility finding regarding the Applicant's arrest warrant and the lack of summons?*

[10] The Applicant argues that the RPD essentially found it was implausible that a warrant for the Applicant's arrest would be provided without first providing a summons. Relying in part on the Response to Information Request No. CHN 105217. E, the Applicant argues that this, in fact, could happen.

[11] The Federal Court in *Valtchev v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 776 at paragraph 7, describes the instance when a decision-maker can make an implausibility finding:

A tribunal may make adverse findings of credibility based on the implausibility of an Applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]

[Emphasis mine]

[12] The Respondent submits that the RPD did not make an implausibility finding, but rather a finding on a balance of probabilities that a summons would have been issued.

[13] I agree with the Applicant that in this case the RPD made a clear implausibility finding, rejecting the Applicant's testimony as implausible solely on the basis that the documentary evidence suggested (but did not definitively show) that a summons would have been issued, and making a negative credibility inference as a result.

[14] The RPD is reasonable to weigh the documentary evidence against an applicant's testimony and prefer the conclusion suggested by the documentary evidence to that suggested by the applicant. However, it is unreasonable to take the further step and draw a negative credibility inference solely on the basis of a suggestion in the documentary evidence. Here, the RPD took this further step, and this renders the RPD's finding unreasonable.

[15] However, the RPD's finding on this issue was not determinative of this matter. The RPD arrived at the conclusion that the Applicant was generally not credible based on all of the facts and the documentary evidence. While this particular finding is problematic, it would not have changed the RPD's overall credibility determination, or the RPD's decision to dismiss the Applicant's claim.

B. *Did the RPD err by making an improper implausibility finding regarding the Applicant's use of her own passport to exit China?*

[16] The Applicant argues that the RPD erred in finding it was implausible that the Applicant could leave China on her own passport if she was wanted by the PSB. The Applicant's evidence on this point was that she was assisted by a smuggler on the trip from China through the United States to Canada, and that the smuggler was present when she was departing China. The

Applicant argues that there is evidence of corruption in China, where government personnel are open to fraud, bribery, and kickbacks.

[17] As is stated in *Huang v Canada (Minister of Citizenship and Immigration)*, 2017 FC 762 [*Huang*], determinations regarding China's exit controls are individualistic and fact-specific.

[18] The Applicant points to the decisions of *Huang*, above at paragraph 13, *Ren v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1402 at paragraph 16 [*Ren*], and *Sun v Canada (Minister of Citizenship and Immigration)*, 2015 FC 387 at paragraph 26 [*Sun*], as examples where this Court found that the RPD unreasonably found it to be implausible that an applicant was pursued by the PSB and still left China on their own passport.

[19] The Respondent, in turn, points to *Li v Canada (Minister of Citizenship and Immigration)*, 2018 FC 877 [*Li*], where the RAD's rejection of the applicant's testimony in favour of the documentary evidence was found to be reasonable.

[20] In this matter, the RPD both relied on documentary evidence which discusses the Golden Shield Project, and an inconsistency in the Applicant's testimony. As a result, this is not an implausibility finding.

[21] The Applicant's argument ignores the RPD's finding that the smuggler did not make arrangements for the Applicant's departure from China. The *Huang*, *Ren*, and *Sun* decisions are

distinguishable on this basis. The RPD stated when reviewing the inconsistency that:

The panel notes that in regard to the claimant's response to a subsequent question by counsel, she stated that the smuggler made arrangements before she moved through Beijing Airport. It was noted that her response to this question was inconsistent with the response she gave to the panel. The claimant explained that she did not understand the panel's question. The panel rejects this explanation as her early response reflected understanding of the question.

[22] The Applicant is asking the Court to reweigh the Applicant's evidence to find that the smuggler did make arrangements, and that is not the role of this Court.

[23] The RPD's conclusion that the Applicant was not wanted by the PSB is reasonable.

C. *Did the RPD err by finding that the Applicant's failure to claim in the United States impugned her subjective fear?*

[24] The Applicant contends that the RPD erred by not considering the fact that the Applicant's ultimate destination was Canada. The Applicant did not reside in the United States and then decided to travel to Canada; rather, the Applicant's intention was always to come to Canada, and the smuggler remained with the Applicant for the two and a half months she was in the United States.

[25] Delay in applying for asylum is a factor the RPD may consider when determining whether an applicant has a subjective fear (*Nezhalskyi v Canada (Minister of Citizenship and Immigration)*, 2015 FC 299 at para 12). I find that it was reasonable for the RPD to find that the length of the delay raised doubts about the Applicant's subjective fear.

[26] As well, the reason provided by the Applicant for preferring to claim asylum in Canada, i.e. that the asylum process is more fair in Canada, has been considered by the Court to also be sufficient reason to question the subjective fear of the Applicant (*Ortiz Garzon v Canada (Minister of Citizenship & Immigration)*, 2011 FC 299).

[27] It was reasonable for the RPD to consider the fact that the Applicant did not make a refugee claim in the United States.

D. *Did the RPD err by finding that the Applicant was not a genuine Falun Gong practitioner?*

[28] The Applicant claims that the RPD's conclusion regarding the Applicant's identity as a Falun Gong practitioner was based on earlier findings, and as the earlier findings are unreasonable, so too should this finding be unreasonable. The Applicant further argues that the author of the confirmation letter was explained to be someone who met the Applicant in the middle of July 2012 and has practiced Falun Gong and distributed flyers with the Applicant since that time. Without providing supporting evidence, the Applicant reasons that "the mere fact that the Applicant could not answer some questions concerning Falun Gong to the satisfaction of the RPD panel was not sufficient to doubt the Applicant's Falun Gong identity."

[29] The Respondent submits that the RPD clearly explained why it did not find the Applicant was a Falun Gong practitioner. This finding mainly focused on the Applicant's claim that she has been practicing Falun Gong for six years, but showed a general lack of knowledge about Falun Gong practices.

[30] The RPD's decision to provide little weight to the confirmation letter was partly based on the issue of the unknown authorship and was also based on the fact that the author was not called as a witness and, therefore, the evidence could not be tested by the RPD. It was reasonable for the RPD to give little weight to the confirmation letter as the evidence had not been tested.

[31] As well, the RPD's findings regarding the Applicant's lack of Falun Gong knowledge were reasonable. The RPD explained that it found the Applicant's testimony on this issue vague and that the Applicant lacked knowledge on basic Falun Gong precepts. The RPD highlighted certain basic teachings that the Applicant could not answer, such as how to "Give Out Righteous Thoughts", her description of cultivation, and others.

[32] The RPD's conclusion on the Applicant's identity as a Falun Gong practitioner was reasonable.

JUDGMENT in IMM-3675-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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