

Federal Court



Cour fédérale

Date: 20190430

Docket: IMM-2021-18

Citation: 2019 FC 290

Ottawa, Ontario, April 30, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

**JINXIAN YANG
XIAOMEI ZHOU
ZHAO YANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review filed pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [Board], dated

April 4, 2018, upholding a decision of the Refugee Protection Division [RPD] denying the Applicants' claims for refugee protection, pursuant to paragraph 111(1)(a) of the IRPA.

[2] The application for judicial review is allowed for the reasons that follow.

II. Background

[3] Jinxian Yang, the Principal Applicant, Xiaomei Zhou, the Secondary Applicant, and their four-year-old son, Zihao Yang, are citizens of China.

[4] The following passage of paragraph 3 of the RAD decision presents the relevant background facts:

The Appellants alleged before the RPD that they fear returning to China because the principal Appellant protested against and criticized the Chinese government for leasing the village land at a rate lower than expected. The principal Appellant was one of five organizers at demonstrations on July 9, 2015 and July 16, 2015. The Public Security Bureau (PSB) went to his home to arrest him on (*sic*) on July 16, 2015. The principal Appellant was not present and his wife, the associate Appellant, was ordered to tell him to surrender as soon as possible. The principal Appellant went into hiding. The PSB returned to his home on July 20, 2015 and August 20, 2015. They told his wife on August 20 that if the principal Appellant did not give himself up in three days, they would arrest her and charge her with concealing a criminal. The associate Appellant further discovered that she could not register their son for kindergarten until her husband's problem was solved. The associate Appellant and the minor Appellant joined the Appellant in hiding on August 22, 2015. The PSB returned to their home after the deadline set for him to surrender. A smuggler was hired and the Appellants came to Canada illegally via the US on November 29, 2015.

[5] On June 12, 2017, the RPD rejected the Applicants' claims as it found that they did not have a well-founded fear of persecution in China. The RPD determined that the Applicants were neither Convention refugees nor persons in need of protection. An appeal was filed with the RAD on July 10, 2017.

III. The RAD's Decision

[6] In a decision dated April 4, 2018, the RAD confirmed the RPD's decision and dismissed the appeal.

[7] According to the Applicants, the RPD committed the following errors in its decision:

- a) The RPD erred in its assessment of the Applicants' credibility;
- b) The RPD erred in its assessment of the supporting documentation they provided; and
- c) The RPD erred in finding that the Applicants did not objectively face a well-founded risk of persecution.

A. *Credibility*

[8] The RPD found that the Applicants failed to present their passports or any travel documentation which impugned their credibility. At the hearing, the Applicants explained that they were advised by their smuggler to get rid of their passports and to give them to him. The RPD rejected this explanation. The Applicants argued that the RPD erred in speculating that

having the passports in the smuggler's possession would serve no use to him once the Applicants arrived in Canada, without making any reference to the objective evidence.

[9] After reviewing the record, the RAD came to the conclusion that the RPD's plausibility finding was not supported by any documentary evidence about the practices of people smugglers; however, it questioned the Applicants' omission to make copies of their passports if they knew that their passports would be retained by the smuggler prior to their departure from China. In any case, the RAD noted that the Applicants were not confronted by this matter at the hearing.

[10] The RAD did, however, confirm the RPD's finding with regards to the Applicants' decision to destroy all of their travel documentation and also found that it undermined the Applicants' credibility.

[11] Although the RPD accepted that the Chinese authorities do not always issue a summons, it nevertheless determined that the Public Security Bureau [PSB] ought to have left a summons if the authorities were searching for the Principal Applicant for several months. The Applicants argued that the objective evidence on file clearly mentioned that "a summons may be issued, that there are variations in police practices from one locality to the next, and that authorities may not always leave documentation of their visit". The Applicants also argued that it was an error to find that the non-issuance of a summons negatively impacted the Principal Applicant's credibility.

[12] After considering Articles 105 and 117 of the *Criminal Procedure Law of the People's Republic of China* regarding the issuance of summonses, the RAD was of the view that:

the circumstances under which the principal Appellant was verbally summoned are not consistent with the documentary evidence. The RAD notes that the principal Appellant's wife was the recipient of a verbal summons on his behalf; however article 117 states that a verbal summons is issued when a criminal suspect is discovered on the scene, and does not refer to family members or other people.

[13] The RAD confirmed the RPD's finding that a written summons would have been issued if the Principal Applicant was wanted by the authorities, given the Principal Applicant's personal circumstances. "The RAD agrees with the RPD that the absence of a summons issued by the PSB was inconsistent with the documentary evidence and draws a negative credibility inference".

[14] The RPD next determined that the Chinese authorities would have been able to identify the Principal Applicant when he left the airport using his own passport, regardless of whether a summons was issued against him. The Applicants argued that the RPD made an error in finding that they were able to leave China using their passports when the Principal Applicant was being sought by the Chinese authorities. The Applicants argued that they were able to travel with their passports because without a summons, the PoliceNet or the Golden Shield was not able to track the Principal Applicant's whereabouts. The Applicants further alleged that the smuggler bribed officials at the airport, which explains why it was possible for them to exit China successfully.

[15] After reviewing the evidence on file, the RAD concluded that the RPD did not err in finding that the Principal Applicant could not have left China using his genuine passport if he

was allegedly wanted by the PSB. Based on a recent Jurisprudential Guide from the IRB Chairperson, in TB6-11632, the RAD found that the documentary evidence on file states that a person who is wanted by the Chinese authorities cannot leave China using his or her own passport.

[16] Next, the RAD reviewed the objective evidence on file and acknowledged that there is corruption in China. However, the RAD noted that there is no mention in the country conditions evidence on China “that corruption extends to the airport security apparatus”. The RAD did not believe that the Principal Applicant was able to pass through security at the airport, even with the smuggler’s alleged bribe to the officials.

[17] After its own review and assessment of the evidence, the RAD confirmed the RPD’s findings and determined that it was not credible that the Principal Applicant left China using his passport when he was allegedly sought by the PSB. The RAD also found that a written summons “would reasonably have been expected”, given the Principal Applicant’s personal circumstances.

B. *Supporting Documents*

[18] The RPD gave no weight to the complaint letter (signed by the Principal Applicant and others in the village) provided by the Principal Applicant, because it determined that anyone could have been the author of that letter. The Board noted that the letter did not contain a national identification number to confirm the Principal Applicant’s identity, date of birth, or address. The letter also failed to mention “a link between the principal Appellant and the alleged protest against the improper land deal by the village committee officials as alleged”.

[19] The RAD reviewed the evidence on file and determined that the RPD did not err in giving little weight to the complaint letter. In addition to the RPD's findings, the RAD also noted that the letter had no date or security features. The RAD concluded that even if it were to give some weight to the complaint letter, it could not establish the Principal Applicant's allegation that he was wanted by the Chinese authorities for his participation in the protests.

C. *Risk*

[20] The RPD found that the Applicants lacked credibility by failing to establish that the Principal Applicant's risk of persecution in China was objectively well founded. "The RAD found that the principal Appellant is not wanted by the PSB and concluded that the cumulative effect of the negative inferences and findings undermined the credibility of the Appellants in general".

[21] The RAD found that the RPD failed to consider the individual circumstances of the Principal Applicant's alleged participation in the protests in China but concluded nevertheless that the issue of risk was not pertinent because they did not believe the Applicants' story. According to the RAD, "the RPD did not err by not fully addressing the documentary evidence regarding official retaliation against petitioners in its decision".

[22] The RAD confirmed the RPD's findings and found that there would not be a serious possibility that the Applicants would be persecuted in China if they were to return to their country of origin.

IV. Issues

[23] After reviewing both parties' written submissions, the Court is of the view that the present matter raises the following issues:

1. Did the RAD err in concluding that the Applicants would not have been able to leave China using their own passports, considering that the Principal Applicant was wanted by the PSB?
2. Did the RAD err in finding that the lack of a summons undermined the Principal Applicant's credibility?
3. Did the RAD err in assessing the documentary evidence presented by the Applicants, such as the complaint letter?
4. Did the RAD err in finding that the Applicants' failure to retain proof of their travel documents negatively impacted their credibility?
5. Did the RAD err in finding that the Applicants did not establish an objectively well-founded fear of persecution?

[24] For the present application, the reasonableness standard applies in reviewing the RAD's decision (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

V. Analysis

[25] The application for judicial review is allowed.

A. *Did the RPD err in concluding that the Applicants would not have been able to leave China using their own passports, considering that the Principal Applicant was wanted by the PSB?*

[26] The Applicants argue that the Board erred in making plausibility findings on the Applicants' exit from China using their own passports. The Applicants submit that there are relevant Federal Court cases that contradict the RAD's finding on the issue of bribery at the airport in China (*Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 [*Huang*]; *Sun v Canada (Citizenship and Immigration)*, 2015 FC 387; *Zhang v Canada (Citizenship and Immigration)*, 2008 FC 533). The Applicants submit that the Board had the duty to explain why the smuggler could not have reasonably bribed the officials at the airport in China in light of the country conditions on file.

[27] It is trite law that "plausibility findings should be made only in the clearest of cases" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7).

Therefore, the Applicants submit that the RAD failed to consider a recent case that overturned the Board's decision and found that "the RAD had no verifiable evidentiary base to reach the fundamentally important implausibility finding" (*He v Canada (Citizenship and Immigration)*, 2017 FC 1089 at para 11).

[28] Moreover, the Applicants argue that the RAD erred in misapplying the Jurisprudential Guide as the facts of the present matter do not apply to those in the Jurisprudential Guide. In the case at bar, the Applicants explain that the PSB did not issue a summons against the Principal Applicant, whereas a summons was indeed issued against the claimant in the facts of the Jurisprudential Guide.

[29] The Court finds that the RAD erred in finding that there was insufficient objective evidence in the record to conclude that corruption exists in the airport security. The RAD failed to consider the RPD's finding that "airport officials can be bribed" (Certified Tribunal Record [CTR], Reasons and decision of the RPD, p 77). Instead, the RAD improperly focused on the Australian Refugee Review Tribunal Background paper to support its own findings on corruption. The Court finds that the RAD ignored the RPD's finding on corruption in China and failed to make its own assessment on the matter in its reasons for decision. Based on the entire evidence on file, it was unreasonable for the RAD to disregard the RPD's finding by concluding that it was not credible or plausible that officials can be bribed in the airports in China, thus allowing the Applicants to leave China using their own passports.

This is an exercise in wilful blindness given the fact that the RPD found that "there is systemic corruption in China and airport officials can be bribed" and "authorities in China do not always apply regulations evenly."

(Huang at para 68a)

B. *Did the RPD err in finding that the lack of a summons undermined the Principal Applicant's credibility?*

[30] The Applicants argue that the RAD erred in drawing a negative inference on the Principal Applicant's credibility for the lack of summons issued by the PSB. According to the Applicants, the RAD failed to properly apply the objective evidence or the relevant case law to the facts of the present case (*Huang* at para 69b); *Zeng v Canada (Citizenship and Immigration)*, 2014 FC 1060 at para 28). It is unclear why, on one hand, the RAD acknowledged that summonses are not always issued when an individual is wanted by the Chinese authorities and, on the other hand, the RAD came to the conclusion that it is reasonable to expect that a written summons would have been issued in the present matter, based on the Principal Applicant's personal circumstances.

[31] The Court notes that the Board found that the lack of summons negatively impacted the Principal Applicant's credibility, particularly because the PSB allegedly attended the Applicant's home on four occasions. The RAD reviewed the documentary evidence regarding summonses in China and referred to the *Criminal Procedure Law of the People's Republic of China*, particularly articles 105 and 117 which state the following:

Article 105 Summons, notices and other court documents shall be served upon the addressees personally; or, if the addressee is absent, may be received on his or behalf by an adult member of his or her family or a responsible person of his or employer. [...].

Article 117 A criminal suspect for whom an arrest or detention is not necessary may be summoned to a designated place in the city or county where the criminal suspect resides or his or her residence for interrogation, but credentials from the people's procuratorate or public security shall be produced.

A criminal suspect discovered on the scene may be verbally summoned after a work pass is produced, but it shall be noted in the interrogation transcript. [...]. [Emphasis added by the Court].

(CTR, the *Criminal Procedure Law of the People's Republic of China*, pp 540 and 542)

[32] The Court finds that the RAD seems to have misinterpreted the terms of articles 105 and 117 as it erred in finding that “a verbal summons is issued when a criminal suspect is discovered on the scene” (CTR, Reasons and decision of the RAD, p 9). Based on the objective evidence, the RAD further concluded that while the summons policy is not always implemented, “it is reasonable that one would have been issued in respect of the principal Appellant” and “the PSB had more than a casual interest in the principal Appellant” (CTR, p 9). Given that the Board acknowledged that a summons is not always issued, the Court finds that the RAD failed to explain why the lack of a summons in this particular case undermined the credibility of the Principal Applicant when the objective evidence on file clearly shows that summonses “may” be issued (*Wang v Canada (Citizenship and Immigration)*, 2018 FC 1124 at paras 42-43; *Liang v Canada (Citizenship and Immigration)*, 2011 FC 65 at paras 11-14).

[33] The Court is cognizant of the submissions made by the Applicants against other negative credibility findings by the Board, however, in light of all the above, the Court finds that there are sufficient reviewable errors in the present application to render the RAD’s decision unreasonable.

[34] Given that the RAD’s decision is unreasonable, the Court concludes that the decision 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).

VI. Conclusion

[35] The application for judicial review is allowed. No question of general importance will be certified.

JUDGMENT in IMM-2021-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is referred to a differently constituted panel for reconsideration;
3. There is no question of general importance to be certified; and
4. There is no order as to costs.

“Paul Favel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Stephanie Fung FOR THE APPLICANTS

John Loncar FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates FOR THE APPLICANTS
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario