

Federal Court



Cour fédérale

Date: 20160414

Docket: IMM-4245-15

Citation: 2016 FC 406

Montréal, Quebec, April 14, 2016

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

ZHONG SUI, XINYA YANG, XUHONG YANG

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision made on August 25, 2015, by a member of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada, dismissing an appeal of a decision of the Refugee Protection Division (RPD) according

to which the applicants were found to be neither Convention refugees under section 96 of the IRPA nor persons in need of protection within the meaning of section 97 of the IRPA.

II. Facts

[2] The principal applicant, Ms. Zhong, and her two minor children, XinYa Yang and Xuhong Yang, are citizens of China. The principal applicant (sometimes referred to herein simply as the applicant) alleges that she has been practising Falun Gong in China since 2007, as a way of dealing with stomach pains which were unresponsive to medical treatment. She further alleges that in November 2007, she was arrested by security forces for teaching others the practice of Falun Gong, and was tortured while imprisoned. She was eventually released, but was again arrested for practising Falun Gong in 2013. She alleges that she was then sent to prison for two months, during which time she was sexually assaulted and had her personal property stolen. In 2007, the applicant's lawyer allegedly filed an appeal of her detention, and her husband filed a complaint with the municipal government. The applicant also alleges that, after her arrest in 2013, members of her family appealed to the local court and friends and family demonstrated at the City Hall on her behalf.

[3] The applicant further alleges that in 2014, her municipal government was planning to host a conference, and so issued an arrest list for anyone who they considered to be a trouble-maker. The applicant alleges that she learned that her name was on the list and, fearing that she would be arrested and tortured, she obtained a visa and travelled to Europe in June 2014. After returning to China, she obtained a visa for the United States, and travelled there with her children. They subsequently travelled to Canada, where they made their refugee claim.

[4] The applicants' refugee claim was heard by the RPD over two days and was decided on May 29, 2015. The RPD found that the applicant was not credible, and so rejected her claim. The RAD confirmed the RPD's determination on August 25, 2015.

III. RAD Decision

[5] Following the decision of Mr. Justice Michael Phelan in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] at paras 54-55, the RAD conducted its own assessment of the RPD's decision and came to an independent conclusion that the applicant was neither a Convention refugee nor a person in need of protection. The RAD accorded deference to the credibility findings of the RPD and to other findings where the RPD had a particular advantage in reaching its conclusions.

[6] It should be noted that the Federal Court of Appeal (FCA) recently issued its decision on the appeal of Justice Phelan's *Huruglica* decision: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica* (FCA)]. The FCA's decision is discussed later in these reasons.

[7] Regarding the merits of the applicant's appeal, the RAD found that there was an absence of corroborating documents. In particular, the applicant did not provide medical evidence relating to the treatment of her medical condition, which she had asserted was the impetus for her engagement in the practice of Falun Gong. The RAD found that the applicant ought to have had a medical booklet, given that she alleged that she received treatment for her illness, and that the documentary evidence states that clinics and hospitals in China issue such booklets to patients.

The applicant argued that there was no basis to believe that she would have a medical booklet. The RAD noted that the applicant had testified that her medical documents do exist. The applicant also stated that she did not know that medical documents would be required as evidence. The RAD did not accept this explanation for the absence of these documents because she had been represented throughout the process by competent counsel and the relevance of such documents was clear.

[8] The applicant also failed to provide documentation regarding her arrests and detention. She submitted that she was detained through extrajudicial measures without documentation, but the RAD was not persuaded by this argument. The RAD found that, while there was some evidence that the police sometimes act outside the law, there is no evidence (as asserted by the applicant) that they always do so when dealing with practitioners of Falun Gong. The RAD found that the applicant ought to have been able to provide some documentation regarding her arrests, if not from the police, then from her lawyer, who she testified filed an appeal on her behalf, or her husband, who she stated sent a letter to the city's mayor.

[9] The RAD also agreed with the RPD's adverse credibility finding made with regard to the applicant's lack of knowledge of the practice of Falun Gong. While the RAD acknowledged that Federal Court jurisprudence cautions against determining religious identity on the basis of a refugee applicant's religious knowledge, it stated that the evidence establishes that knowledge is an important part of Falun Gong. Accordingly, the RAD found it reasonable to expect that a person who claims to be a Falun Gong practitioner, and to have taught Falun Gong to others, since 2007, would be able to demonstrate a level of knowledge commensurate with her claimed

experience in the practice. The RAD found that the applicant had not demonstrated this level of knowledge, nor offered a reasonable explanation for her inability to do so. The RAD concluded that this undermined her allegation that she was a Falun Gong practitioner.

[10] The RAD also agreed with the RPD's adverse credibility finding made with regard to the applicant's failure to seek refugee protection in Europe during her June 2014 trip, and her decision to subsequently return to China. The RPD had rejected the applicant's explanation for failing to claim refugee status in Europe (that she feared leaving her children motherless) on the basis that she is a somewhat sophisticated individual, and would therefore have been aware of the possibility of making an asylum while in Europe rather than risking arrest upon return to China. The RAD agreed with this assessment of her level of sophistication, though for reasons different from those of the RPD, namely that the applicant completed her Basis of Claim form without the assistance of counsel, and that she obtained a US visa, which would have required an in-person interview, and managed to convince an agent that she intended to return to China even though she did not. More importantly, the RAD concluded that, regardless of the applicant's level of sophistication, her failure to claim refugee status in Europe and her decision to return to China when she allegedly faced arrest undermined both her subjective fear and the credibility of her allegation that she was wanted for arrest in China.

[11] The RAD's final basis for upholding the RPD's decision was that it was not credible for the applicant to have been able to leave China on her own passport, given her allegation that she had been placed on an arrest list and was wanted by the authorities. The RAD was not persuaded by the applicant's argument that she accomplished this by using a smuggler and taking advantage

of the rampant corruption amongst Chinese officials. The RAD found that the documentary evidence supported the conclusion that Chinese security officials have sufficient resources available to apprehend wanted individuals seeking to enter or leave the country, and that it is highly unlikely that the applicant would have been able to bypass all of the security controls in place. The RAD concluded that the applicant's ability to enter and leave China on her own passport suggests that she was not in fact being pursued by the authorities.

[12] For the foregoing reasons, the RAD found that the applicant had not satisfied her burden of establishing that she faced a serious possibility of persecution on Convention grounds, or that, on a balance of probabilities, she would be subjected to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture, should she return to China. Having found that the applicant was not at risk of persecution, the RAD further found that her minor children were also not at risk of persecution and were therefore not persons in need of protection. The RAD accordingly confirmed the decision of the RPD and dismissed the applicant's appeal.

IV. Issue

[13] The only issue in this case is whether the RAD committed a reviewable error in its decision.

V. Standard of Review

A. *The Court's Standard of Review*

[14] On most issues, this Court must apply a standard of reasonableness in reviewing the RAD's decision: *Huruglica* (FCA) at para 35. There are some aspects of the RAD's decision that the applicant argues should be reviewed on a standard of correctness because of an absence of procedural fairness, but I have found no error in these aspects.

B. *The RAD's Standard of Review*

[15] Neither party made submissions regarding the appropriate standard by which the RAD must review decisions of the RPD. As indicated above, the RAD followed the standard set out by Justice Phelan in *Huruglica*, which decision was recently considered by the FCA. Madam Justice Johanne Gauthier, speaking for the FCA, concluded that, generally speaking, the RAD must apply a correctness standard to the review of RPD decisions, though the RAD may defer to the RPD's findings of fact or mixed fact and law where the RPD enjoys a meaningful advantage over the RAD in making such finding: *Huruglica* (FCA) at paras 70 and 103.

[16] Even though the FCA modified somewhat the approach taken by Justice Phelan in *Huruglica* which was relied on by the RAD in the present case, I am of the view that the RAD made no reviewable error in describing and applying its role in the appeal of the RPD's decision.

VI. Analysis

[17] It is important to note that this is a review of the RAD's decision, not of the decision of the RPD. The applicant argues correctly that the focus must be on the conclusions and reasoning of the RAD.

[18] As discussed above, the RAD concluded that the applicant lacked credibility in respect of five aspects of her refugee claim:

- A. An absence of medical records corroborating her claim that it was pain experienced during her first pregnancy, which pain was unmanageable using conventional medicine, that led her to the practice of Falun Gong;
- B. An absence of evidence corroborating her claims of arrest and detention by authorities in 2007 and in 2013 for teaching Falun Gong;
- C. Her lack of fundamental knowledge of Falun Gong commensurate with her alleged experience;
- D. Her decisions (i) not to make a refugee claim during her trip to Europe in 2014, and (ii) to return to China where she allegedly faced arrest;
- E. Her ability, even with the assistance of a smuggler, to leave China using her own passport while allegedly facing arrest.

[19] Each of these issues is addressed in turn below.

A. *Medical Documentation*

[20] In support of her argument on this aspect of the RAD's decision, the applicant asserts (as she did before the RAD) that there is no basis to conclude that she has a medical booklet.

Though the applicant did indeed acknowledge before the RPD that she has a medical booklet at home in China, she argues that the term "medical booklet" is a mistranslation, and what is referred to is simply a medical record.

[21] I do not accept this argument because there is simply no evidence to support it.

[22] Since the applicant's alleged practice of Falun Gong was prompted by pain that could not be managed by a doctor, it was reasonable for the RAD to consider evidence of doctor's visits to be relevant, and to draw a negative inference from the absence of such evidence.

B. *Documentation of Arrest and Detention*

[23] The applicant argues that the RAD misunderstood the requirements for doubting her credibility by expecting evidence that the Chinese authorities never provide documentation concerning an arrest for practising Falun Gong. I disagree. I prefer the respondent's argument that the RAD did not misunderstand the requirements for doubting credibility, and was rather concerned with the fact that the applicant had provided no evidence at all to corroborate her alleged arrests and detention. Such evidence could have come from Chinese authorities, but could also have come as a result of the appeal filed on the applicant's behalf in 2007, or the letter

sent by the applicant's husband to the mayor of the city in 2007. It could also have come as a result of the appeal filed following the applicant's alleged arrest and detention in 2013.

[24] The applicant argues that the RAD's negative credibility inference was based entirely on an expectation that there would be some documentation in relation to the applicant's 2007 appeal. The applicant notes that there is no evidence that there would be any documentation in relation to such an appeal. The applicant also argues that the RAD's reliance on this issue was procedurally unfair because it was raised for the first time by the RAD and without seeking comment from the applicant.

[25] I do not agree that the basis for the RAD's negative credibility inference was as limited as the applicant argues. Her argument focuses on the word "accordingly" in paragraph 23 of the RAD's decision, and asserts that this word refers only to the preceding sentence. I do not read the decision as narrowly as that. In my view, the word "accordingly" refers to all of the discussion by the RAD of the issue of the absence of corroborating evidence of the applicant's arrests and detention.

[26] I find it entirely reasonable that the RAD drew a negative inference from the absence of any corroborative evidence at all on this issue.

C. *Knowledge of Falun Gong*

[27] The RAD acknowledged the jurisprudence cautioning against determining religious identity based on religious knowledge, or lack thereof. The RAD assessed the applicant's

credibility as a Falun Gong practitioner based on whether she was able to demonstrate a level of fundamental knowledge commensurate with her alleged experience. In my view, this was a reasonable approach to gauging the genuineness of the applicant's adherence to Falun Gong.

[28] The applicant claimed to have been practising, and even teaching, Falun Gong since 2007, including owning and having read several key texts.

[29] The applicant criticizes the RAD for noting, but not taking a position on, the RPD's finding that the applicant lacked spontaneity in describing the practice of Falun Gong. The applicant argues that the RPD had erred by failing to give examples of such lack of spontaneity, and that the RAD's failure to state that its own conclusions were reached regardless of the RPD's error was a failure to exercise its jurisdiction and/or to provide reasons, and hence a breach of natural justice. In my view, it was not necessary for the RAD to reach a conclusion on whether the RPD was in error on this point, since the RAD was properly engaged in an independent assessment of the evidence.

[30] The applicant also refers to the fact that the RAD relied in part on the applicant's lack of knowledge of verses that are integral to the practice of Falun Gong. The applicant also notes that the parties are agreed that such reliance by the RAD was erroneous. The applicant argues that she was denied natural justice because the RAD did not alert her to this issue.

[31] In my view, the RAD's erroneous reliance on the applicant's lack of knowledge of verses was not determinative. The RAD reached a conclusion as to the applicant's lack of credibility on

this issue on the basis of other evidence, and referred to the verses only in a separate paragraph thereafter which headed “[i]n addition”.

[32] The RAD clearly took into account the applicant’s personal circumstances and was aware that the applicant had turned to Falun Gong in the first place as a way to deal with her pain. I am not persuaded that the RAD’s finding that the applicant lacked credibility due to her limited knowledge of Falun Gong was unreasonable.

D. *Failure to Seek Refugee Protection in Europe – Return to China*

[33] The applicant’s argument on this issue focuses on the fact that she was travelling with the assistance, and following the instructions, of a sophisticated smuggler whose eventual plan was to obtain a US visa for the applicant and her children. Her trip to Europe and her subsequent return was part of this plan.

[34] The applicant devotes considerable energy to an argument that the RAD erred in its conclusion concerning the applicant’s level of sophistication. In my view, the RAD’s reliance on the applicant’s level of sophistication was not important enough to merit concern. The RAD seems to have cited the applicant’s level of sophistication simply to support its conclusion that she would have been aware of the possibility of an asylum claim in Europe and the possible consequences of being caught upon her return to China. In my view, this conclusion was open to the RAD.

[35] The applicant argues that the applicant was thinking of her children when she took the risk of returning to China. She did not want to leave them motherless. However, the applicant's willingness to risk being arrested and detained for an extended period of time (during which her children would indeed be motherless) seems to conflict with her stated concern.

[36] In my view, the RAD's conclusion of a lack of credibility on this issue was entirely reasonable.

E. *Ability to Leave China without Arrest*

[37] The applicant argues that the RAD's conclusion on this issue suggests that no one who is wanted for arrest in China could ever leave China using their own passport. The applicant argues that the evidence does not support this. The applicant also cites jurisprudence to the effect that findings of implausibility should be reached only in the clearest of cases.

[38] The applicant argues that the RAD failed to appreciate the sophistication of the system that smugglers may use to thwart the Golden Shield system used by border officials to detect persons sought for arrest crossing the border. The applicant cites evidence of links between smuggling and organized crime, between organized crime and government, and between government and border security officials.

[39] The applicant argues that it was unreasonable to conclude that a person wanted for arrest could not leave China using their own passport. In support of this argument, the applicant cites

Zhang v Canada (Citizenship and Immigration), 2008 FC 533 [*Zhang*] and *Sun v Canada (Citizenship and Immigration)*, 2015 FC 387 [*Sun*].

[40] The respondent argues that the RAD was well aware of the evidence concerning the Golden Shield system, including its widespread use by border officials for both departing and returning travelers, and its use to track down Falun Gong practitioners. The RAD was also aware of the possibility of bribing government officials.

[41] The respondent notes that the applicant's story is that she managed to cross the border using her own passport while being sought for arrest not just once, but three times, twice departing and once returning. The RAD acknowledged explicitly that it might be possible for a smuggler to bypass some of the border security controls. However, the RAD found it highly unlikely that the applicant could have repeatedly bypassed all such controls.

[42] To counter the *Zhang* and *Sun* decisions cited by the applicants, the respondent argues that the facts are distinguishable. In *Zhang*, the RPD had unreasonably based its decision on a conclusion that possibly hundreds of bribes would have to be paid to bypass border security controls. *Sun* was based on evidence of conditions in China which are now out of date; there, the RPD's decision was based on a Response to Information Request dated July 2, 2009, whereas the RAD's decision in this case was based on two Responses to Information Request dated March 6 and 7, 2014, almost five years later. As stated by the respondent, the most recent evidence indicates that the authorities in China have expanded the breadth and complexity of its information sharing regime, have tightened security at airports, and have arrested wanted

individuals who tried to escape. The respondent also cites the recent decision in *Ma v Canada (Citizenship and Immigration)*, 2015 FC 838 which found at para 53 that the RPD had been reasonable in finding that it was implausible that a person who was sought for arrest would be able to leave China undetected using her own genuine passport.

[43] The respondent argues that the applicant's argument on this issue comes down to a challenge to the RAD's assessment of the evidence. I agree. The RAD was well placed to make this assessment, including the determination of implausibility, and to weigh the applicant's credibility on this issue in view of her lack of credibility on the other issues. Moreover, the RAD cited evidence to explain its finding of implausibility.

[44] I find also that the strength of the RAD's conclusions on the other issues is such that, even if its conclusion on the applicant's ability to leave China undetected was weak, I would maintain the RAD's decision. Its conclusions that the applicant lacked any evidence to corroborate either (i) the alleged pain that led her to Falun Gong, (ii) the alleged practice and teaching of Falun Gong that led to her arrests and detention, and (iii) the alleged arrests and detention themselves, together with the applicant's willingness to expose herself unnecessarily to arrest by returning to China, are compelling and easily sufficient to support the RAD's decision.

VII. Conclusion

[45] For the foregoing reasons, it is my opinion that this application for judicial review should be dismissed. The parties are agreed that there is no serious question of general importance to be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application is dismissed. No serious question of general importance is certified.

“George R. Locke”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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