Federal Court  Cour fédérale

Date: 20170209

Docket: IMM-3246-16

Citation: 2017 FC 165

Ottawa, Ontario, February 9, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

RUJUAN GONG
GUIBO WANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Rujuan Gong [the Principal Applicant], pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB], dated May 8, 2016, in which the Applicants were found to be neither Convention refugees nor persons in need of protection under the *IRPA* [the Decision]. Leave was granted November 18, 2016.

[2] The Principal Applicant and her husband [male Applicant] are citizens of China. The Principal Applicant was allegedly a primary school teacher in China and the male Applicant was allegedly the director of a company. The alleged events resulting in the Applicants' claim arose in August 2015. As a result of problems the Principal Applicant was experiencing with her upper back, she was invited by a colleague to attend a special talk about maintaining good health. Both the Principal Applicant and the male Applicant attended, believing it to be Qi Qong, an organization that is not illegal in China. However, no exercises were performed at this meeting. The Applicants then attended a second meeting (the so-called "Tea House" meeting). The Applicants allege that, in the middle of a discussion about "Talk 6", several Public Security Bureau [PSB] officers raided the Tea House. All members were taken to the local police station for questioning.

[3] The Applicants allege that it was not until they were brought in for questioning that they realized they had been attending Falun Gong meetings. Falun Gong is illegal in China. PSB officers demanded the Applicants provide information on the others present at the meeting. The Applicants allege they had no such information. They were detained overnight and let go with a warning to not change their address or travel. The PSB visited their home two to three times per month. They were brought back to the station in September 2015 and warned that if they did not expose the other members, they would be arrested and convicted for practicing Falun Gong.

[4] A few days after they were released, the Applicants found an agent to help them with their visa application for Canada. They received their visas in November 2015 and arrived in Canada with the agent on December 4, 2015. The Applicants allege that the agent took their

passports and did not return them. The Applicants allege that the PSB visited their work places in mid-December 2015, shortly after their arrival in Canada.

[5] The standard of review is determined by reference to *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*]. In *Dunsmuir*, the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." A decision by the RAD reviewing a finding by the Refugee Protection Division [RPD] of the IRB is to be reviewed by this Court on the standard of reasonableness. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, determined that the RAD is to review the RPD's findings on the standard of correctness, but may defer to the RPD on credibility findings "where the RPD enjoys a meaningful advantage".

[6] In *Dunsmuir*, above at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[7] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole:

Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper,

Ltd, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[8] Because this case involves credibility findings and findings of implausibility, it is worthwhile to summarize the principles. First of all, an applicant is presumed to tell the truth: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA). However, this presumption is rebuttable; where the evidence is inconsistent with the applicant's sworn testimony, the presumption may be rebutted: *Su v Canada (Citizenship and Immigration)*, 2015 FC 666 at para 11, Fothergill J [*Su*], citing *Adu v Canada (Minister of Employment and Immigration)* (1995), 53 ACWS (3d) 158, [1995] FCJ No 114 (FCA).

[9] Additional authorities on the assessment of credibility and plausibility are summarized as follows. First, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16, Tremblay-Lamer, J; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68, Blais J. Second, the Federal Court of Appeal confirms that findings of fact and determinations of credibility fall within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA) [*Giron*]. Third, the RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10,

O'Reilly, J; and see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD, "… is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence. Third, it is well-established that the RPD may make credibility findings based on implausibility, common sense and rationality, although adverse credibility findings "should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case": *Haramichael v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1197 at para 15, Tremblay-Lamer J, citing *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 10-11, Martineau J [*Lubana*]; *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (FCA). Fourth, the RPD may reject uncontradicted evidence if it "is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence": *Lubana*, above at para 10. Fifth, the RPD is entitled to conclude that an applicant is not credible "because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'": *Lubana*, above at para 9.

[10] With this law in mind, I turn to the RPD and RAD decisions below.

[11] The determinative issues before the RPD were credibility and implausibility. The RPD drew negative inferences from the lack of corroborating medical documentation for the Principal Applicant's alleged back problems, from the public location (the Tea House) in which the Falun

Gong meetings were allegedly held and from the Applicants' ability to leave China on their own documents despite being wanted by the PSB for interrogation about other Falun Gong practitioners. The RPD had further credibility concerns arising from the lack of supporting documentation which, according to the documentary evidence, the Applicants would have had, such as search warrants and written summonses. The RPD had further credibility concerns from there being "no documentation to demonstrate where [the Applicants] are employed or if they are employed". The RPD noted additional credibility concerns from the Applicants' failure to include their daughter on their BOC, despite amending the form in March 2016 and attesting to the truthfulness, completeness and correctness of the information contained therein; however, the RPD acknowledged that this omission was not central to the case. In conclusion, the RPD found the PSB was not looking to convict the Applicants for being "genuine Falun Gong practitioners" if they did not report the names of other followers and, therefore, the Applicants were neither Convention refugees nor persons in need of protection.

[12] The Applicants appealed this decision to the RAD and raised a number of issues which are also raised on judicial review.

[13] The RAD found the Applicants' assertion that the RPD ought to have rendered two separate decisions to be without merit; it noted that the male Applicant had relied on the Principal Applicant's Basis of Claim [BOC] narrative and the RPD had considered the evidence of both before dealing with their allegations in both its analysis and conclusion. This issue is pursued on judicial review but I agree it is without merit. This Court held in *Murrizi v Canada (Citizenship and Immigration),* 2016 FC 802 at para 7, McVeigh J (judicial review granted in

respect of two different Albanian blood feuds, one not assessed), that the RPD may deal with multiple claimants in a single decision, provided it addresses distinct issues separately. I agree.

[14] The RAD found the absence of a written summons where one reasonably would have been issued, together with the Applicants' ability to exit China on their own passports, were central to their claim. The RAD found that the alleged actions of the PSB indicated a heightened interest in the Applicants, which suggested that a written summons would likely have been issued; as such, the lack of any such summons having been issued for the Applicants damaged their credibility. The RAD also canvassed the objective documentary evidence regarding China's Golden Shield Program and the exit and entry of persons of interest, and determined it was highly unlikely that the Applicants could have bypassed all security controls, even with the assistance of a smuggler; it was therefore neither credible nor plausible that the Applicants could leave China on their own passports as alleged. In my respectful view, these conclusions by the RAD are reasonable, in particular because they were supported by country condition evidence. Each case is fact-specific and decisions concerning China's exit controls determined on different country condition evidence, while important for the principle that each case must be determined on the evidence, cannot be used to decide cases where the facts differ. In my respectful view, in this case, the RAD was entitled to draw an adverse inference from the Applicants' ability to leave China on their own passports: *Zhong v Canada (Minister of Citizenship and Immigration)*, 2016 FC 346 at para 29, Boswell J.

[15] The RAD found the Applicants' failure to provide any supporting documentation for their place of employment was not a peripheral issue but rather, was indicative of the PSB's ongoing

pursuit, which went to the heart of their claim. Given the significance of the Applicants' allegations, the RAD found that failure to provide supporting evidence called that part of their testimony into question. With respect however, this conclusion is contrary to the evidence in that evidence of employment was indeed filed in respect of both Applicants; standing alone, this finding is not defensible on the record.

[16] The RAD found the absence of medical documents, the public Tea House location in which the Falun Gong meetings allegedly took place and the omission of the Applicants' daughter from their BOC, while not going to the heart of the Applicants' claim, all detracted from their credibility. The RAD also found that the reference to "Talk 6" in the Principal Applicant's BOC suggested the Applicants understood the type of sessions they were attending, contrary to their allegations. In my view, these findings are of mixed value in terms of reasonableness considerations. Any reliance on the medical documents was not reasonable because it was entirely unreasonable to expect such would be retained. Evidence of the false information regarding the daughter was reasonably considered to detract from the Applicants' credibility because, as the RAD found, it begged the question of the accuracy of their BOC; this became particularly relevant because the untruthful aspect was not only in the original BOC but was repeated in the BOC after it was amended by the Applicants. The "Talk 6" evidence confirms the Applicants were at a Falun Gong meeting, but is otherwise of little relevance in my view.

[17] The public nature of the Tea House in which the alleged Falun Gong meeting took place was, in my view, reasonably the subject of an implausibility finding by the RAD; the evidence

was that Falun Gong is actively and vigorously repressed in China. The proposition that it was not plausible that Falun Gong would meet its supporters in a public Tea House is directly tied to the evidence, is rational and is based on common sense; there is no merit in the Applicants' allegation otherwise.

[18] The Applicants also raised an issue with the RAD's plausibility finding that the lack of a written summons, where one should have reasonably been issued, damaged the Applicants' credibility. The RAD summarized the RPD's findings regarding the lack of a written summons, a search warrant or interrogation notes and the Applicants' submission that the RPD had engaged in speculation in coming to these conclusions. However, the RAD's credibility finding centred on the lack of a written summons in light of the allegations made by the Applicants themselves of the PSB's heightened interest in them. In coming to this conclusion, the RAD assessed the Applicants' allegations of being visited and questioned by the PSB, of having their house searched and of the PSB visiting their places of employment since their departure from China. The RAD also referenced the country condition documents and reasonably considered the fact that the policy surrounding written summons and subsequent arrest summons are not always followed. This finding was not just connected to evidence provided by the Applicants, but also to country condition evidence concerning such summons. In my respectful view, these findings were open to the RAD considering the deference owed to the Board on credibility determinations.

[19] The RAD found the Applicants' BOC was silent on any *sur place* claim and that no evidence had been submitted to that end. On this basis, the RAD found there to be nothing

improper in the RPD's lack of questioning in this regard. I agree: neither the RPD nor the RAD has the responsibility to open up a line of questions into *sur place* where the Applicants, assisted by counsel, choose not to. In any event, the position of the Applicants was that they were not Falun Gong adherents; a *sur place* inquiry would normally be directed to the reverse.

[20] In conclusion, the RAD concluded there was insufficient credible and trustworthy evidence to find the Applicants were wanted by the PSB. This finding was, with respect, open to it on the record.

[21] Judicial review is not a treasure hunt for errors. The decision must be reviewed as an organic whole. It is not simply a matter of adding the positives and subtracting the negatives. In this case, standing back and viewing it as a whole, noting that in some respects the RAD acted unreasonably but in others its conclusions are supportable, I have concluded that the decision falls within the range of permitted outcomes that are defensible in terms of the facts of this case, including the record, and the law, as required by the Supreme Court of Canada in *Dunsmuir*.

[22] Neither party proposed a certified question and in my view none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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