

Federal Court



Cour fédérale

Date: 20170509

Docket: IMM-4753-16

Citation: 2017 FC 475

Ottawa, Ontario, May 9, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SIU HAK LAU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision [the Decision] made by the Refugee Appeal Division [RAD] on October 20, 2016, where it dismissed the Applicant's appeal and confirmed the decision of the Refugee Protection Division [RPD] that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c27 [IRPA]. This application is brought pursuant to subsection 72(1) of the IRPA.

[2] The Applicant is a 60-year old national of China with a right of residency in Hong Kong. She married her ex-husband in 2003. He became abusive toward her in 2009 and they divorced in 2010. However, she alleges that after the divorce he continued to contact her and force her to give him money. While the exact timeline is not clear from the record, it appears that the Applicant lived in Sydney, Australia for much of the 2000s, first with and then without her husband. She moved back to Hong Kong, before coming to Canada in August 2012.

[3] The Applicant first arrived in Canada in August 2012. In her Basis of Claim form she indicated she feared for her life because her ex-husband was harassing her and had threatened to kill her.

[4] Both the RPD and the RAD found the Applicant's story was not credible, as her testimony was inconsistent and changed often as well as being at odds with her Basis of Claim form, particularly with respect to her husband's actions. Each of the RPD and RAD determined the Applicant had failed to prove the central element of her claim: that she feared her ex-husband.

[5] For the reasons that follow, this application is dismissed.

II. Issue and Standard of Review

[6] The Applicant has raised a single issue, which is that the RAD failed to assess the argument she put forward as the basis for her appeal to it.

[7] The standard of review for assessing a decision by the RAD is reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35.

[8] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

III. **Positions of the Parties**

[9] While the RPD made several credibility findings, before the RAD the Applicant challenged only one aspect of the RPD decision: the finding that she is neither subjectively afraid of persecution nor credible because she did not make a claim for refugee protection until April 2016, roughly four years after she arrived in Canada. She says this was a determinative issue before the RPD, and as the RAD failed to deal with it, the matter must be sent back for redetermination.

[10] The Applicant's evidence was that she did not make a claim for refugee protection on entering Canada because, when she was living in Australia, she received information that only Falun Gong practitioners or Christians were eligible for refugee claims in Canada.

[11] The Respondent takes issue with the Applicant's characterization that the determinative issue before the RPD was her lack of credibility arising from her delay in claiming refugee protection. The Respondent notes the Applicant did not contest any of the various credibility findings made by the RAD. Those findings agreed with the credibility findings made by the RPD. As such the delay in making her refugee claim was not at all determinative of the outcome that she had no subjective fear.

[12] The Applicant said she did not know when she arrived in Canada that she was eligible to make a refugee claim and when she found out she made the claim right away. She submits that her sworn testimony of what she was told in Australia is to be believed and taken as true in the absence of evidence to the contrary. By the RPD finding otherwise, it made a speculative credibility finding, and the RAD failed to make any determination on whether the RPD had erred when making that finding.

[13] The Respondent submits there were many negative credibility findings made by the RPD and upheld by the RAD, which listened to the proceedings before the RPD; the Applicant did not challenge any of them other than the delay finding. Those additional findings, not just the delay in applying, led to the determination that the Applicant had not established her claim that she is at risk from her ex-husband.

IV. Analysis

[14] The Applicant has mischaracterized the determinative issue before both the RPD and the RAD. The determinative issue was that neither believed her testimony that she was at risk from her ex-husband. They each found there was an overall lack of credibility displayed by the Applicant changing her story in response to questions by the panel and the inconsistency between her written and oral testimony, particularly with respect to her interactions with her husband.

[15] The RPD did find that the Applicant's actions did not demonstrate a genuine subjective fear of returning to Hong Kong, and that the delay in seeking protection seriously undermined her credibility. However, on reading the reasons of the RPD and the RAD as a whole, the Applicant's period of delay in claiming protection was not determinative of the rejection of her

refugee claim. It was just one of many negative credibility findings. Rather than assess the effect of delay on the Applicant's credibility, the RAD instead weighed the unchallenged credibility findings and concluded they were sufficient to dispose of the Applicant's refugee claim. This was reasonable; the RAD is not obliged to assess grounds of appeal that it reasonably concludes are not determinative.

[16] The negative credibility finding involving the Applicant's delay in making a claim was based on the fact that when she came to Canada, the Applicant said it was not for the purpose of obtaining status but was to avoid her husband. The RPD found that after her arrival, the Applicant was issued two visitor permits which were valid until April 20, 2014. She made her claim for refugee protection in April 2016 only after she was arrested for working without a permit. When she was brought to an immigration office, she was told by an interpreter that if she had a fear in Hong Kong she could make a refugee claim. The Applicant testified that this "reminded" her of the risk she faced in Hong Kong, so she made a claim for protection.

[17] The basis upon which the RPD rejected the claim was not the fact of delay alone; it included several other equally important negative credibility findings, none of which were challenged on appeal to the RAD.

[18] The RPD noted the Applicant had lived in Australia for years. Because she was sophisticated and well-travelled, obtaining several visas for both Australia and Canada over the years, the panel did not find credible her assertion that she thought only Falun Gong practitioners or Christians could apply for refugee status in Canada.

[19] The RPD then made a separate negative credibility finding that the Applicant only decided to make a refugee claim when she was told of the possibility to do so. The panel found, on a balance of probabilities, that a person at risk in their home country would not need to be “reminded” of that risk four years after fleeing.

[20] The Applicant’s testimony conflicted with the information in her Basis of Claim form in which she stated she left Hong Kong in order to avoid her husband. The Applicant testified before the RPD that the last time she spoke to her ex-husband was at the end of February 2012, and that they had stopped living together in January 2010. She went on to say that she had not had any problems with her ex-husband after that date. But, she said that in January 2016 when he found out she was in Canada, he passed a message to one of her relatives saying he would beat her to death if he ever saw her in Hong Kong. When confronted with the inconsistency between her Basis of Claim form and her testimony, the Applicant said her ex-husband had called and harassed her. When she was then reminded that her Basis of Claim form stated her ex-husband sent a message through a relative, the Applicant said she had given the information in her testimony to her lawyer and did not know why it was not in her BOC narrative. The RPD found that addition was an embellishment added by the Applicant to boost her refugee claim. As a result, it drew a negative credibility inference.

[21] The RPD did find the Applicant was credible about suffering from abuse by her ex-husband when they lived together in 2009. The RPD noted, however, that they had been divorced for 6 years and her ex-husband did not live in Hong Kong; he had no direct contact with the Applicant since early 2012. The RPD found it was not credible, therefore, that her ex-husband had threatened her in January 2016.

[22] The Applicant stated in questioning by her counsel that although she did not see her husband, he threatened her in a letter and placed the letter in the door while she was in Hong Kong. When asked why she left Hong Kong, she said she was still living in fear and she was tired of being approached by her ex-husband's younger sister. On questioning, the Applicant testified the younger sister was not threatening her. Later in her testimony, the Applicant testified that she came to Canada because an old friend invited her. The RPD drew a negative credibility inference from that changing testimony regarding her reasons for coming to Canada.

[23] The RAD listened to the recording of the RPD hearing and concluded the testimony of the Applicant was inconsistent with respect to details of her alleged abuse after separation and divorce and her alleged contact with her husband. It found the inconsistencies between her Basis of Claim narrative and her testimony at the hearing showed she was not a credible witness. It concluded there was less than a mere possibility that the Applicant would fear future abuse from her husband, as there was no credible or probative documentation or testimony that she suffered any abuse during the previous six years. The Applicant also had not been consistent about her reasons for leaving Hong Kong or why she could not return to Hong Kong.

[24] It is abundantly clear from reviewing both the RPD and the RAD decision that the Applicant provided ample grounds to make a reasonable finding that she was not credible. It is equally clear that the Applicant's delay in filing her refugee claim was not a determinative issue, but was simply one of several credibility findings emanating from the Applicant's inconsistent and changing story.

[25] I have previously noted in *Bersie v Canada (Citizenship and Immigration)*, 2016 FC 900 how a reviewing Court is to consider credibility findings made by the RPD or the RAD:

[27] The Court of Appeal in *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA) established the starting point for review of decisions based on credibility and the requirements that must be met by the decision-maker when rejecting a claimant on grounds of credibility:

The Tribunal 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.

An important indicator of credibility is the consistency with which a witness has told a particular story. (*Dan-Ash v Canada (Minister of Employment and Immigration)* (1988), 93 NR 33 (FCA))

When a tribunal rejects a claim on the ground that the claimant is not credible, it must state that ground clearly (*Ababio v Canada (Minister of Employment and Immigration)* (1988), FCJ No 250 (FCA)) and it must give reasons for the credibility finding. (*Armson v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 800 (FCA)).

(spacing added to separate discrete principles)

[26] As detailed above, both the RAD and the RPD made clear credibility findings largely based on inconsistencies in the Applicant's story. Each gave reasons for the findings they made. That the RAD found the RPD's credibility finding on delay to be non-determinative does not make the RAD's decision unreasonable. I have no difficulty in finding that the decision by the RAD was in fact reasonable and meets the *Dunsmuir* criteria.

[27] The application is dismissed. No question was posed for certification and none exists on these facts.

JUDGMENT IN IMM-4753-16

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no certified question arising on these facts.

“E. Susan Elliott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4753-16

STYLE OF CAUSE: SIU HAK LAU v THE MINISTER OF CITIZENSHIP
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