Federal Court Cour fédérale

Date: 20170728

Docket: IMM-5147-16

Citation: 2017 FC 736

Ottawa, Ontario, July 28, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

HONG ZIN LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Hong Xin Liu [the Applicant] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a redetermination decision [the Decision] made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated November 8, 2016, which dismissed an appeal from a

decision of the Refugee Protection Division [RPD] dated August 26, 2014, which found he was neither a Convention refugee nor a person in need of protection under the *IRPA*.

[2] While the decision of the RPD was subsequently confirmed on appeal by the RAD, that RAD decision was set aside and ordered redetermined by Justice Boswell in *Liu v The Minister of Citizenship and Immigration* 2016 FC 811. This judicial review is therefore from the second RAD decision on appeal from the same RPD decision.

[3] The Applicant is a citizen of the People's Republic of China. He is 38 years old, married and his wife remains in China. He alleges that in July 2012, he joined the Church of the Almighty God [Church], also known as "Eastern Lightning". It is common ground that the Church is actively suppressed by Chinese authorities.

[4] The RPD dismissed the Applicant's claim on the basis of identity, a subjective basis for his fear, and credibility; it found that the Applicant failed to introduce reliable evidence to establish his identity, lacked credibility with respect to his participation in the group, and was also not credible in explaining how he managed to leave China without showing his passport.

[5] On the redetermination appeal to the RAD, which is now under review, the Applicant tendered additional evidence. Each is described below with my findings thereafter.

[6] The Applicant submitted photos depicting religious activities from December 29, 2014. The RAD found they met the requirement of s 110(4) of *IRPA*. However, the RAD found that the

photos did not add relevance to the decision-making process since the photographs support previous photographs of a similar nature that were before the RPD, therefore they were not admitted as new evidence. In my view this decision was reasonable on the facts and because the RAD is entitled to reject evidence based on considerations of newness in addition to considerations of relevance, credibility, and materiality: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at paras 39 - 49.

[7] The Applicant submitted an affidavit from a Chinese national in Canada who had been declared a Convention refugee because of his religious beliefs. The affidavit states that he believes that the Applicant is a devout believer and that the two of them have studied their religion together since March 2015. The RAD noted that the Applicant had submitted similar letters for his RPD hearing and held it did not provide any new or different information than the other letters. In the newer affidavit, the additional information it provides is that the affiant alleges that he was found to be a Convention refugee because of his religious belief. Another affidavit submitted as new evidence was not accepted as new evidence because a similar letter of support had already been filed before the RPD. In my view these were reasonable decisions and decisions made within the limits afforded to the RAD by *Singh*.

[8] Another letter was submitted by a church member of the Applicant’s Canadian congregation indicating that the Applicant persuaded the author to join and attend the Church. The RAD noted that the letter is somewhat different than the others submitted before the RPD and the first RAD panel. However, it was found by the RAD to provide information that the

Applicant is a member of the Church and would be considered as similar communications that were before the RPD. It appears therefore that this evidence was accepted.

[9] The RAD considered a letter from the Applicant’s wife, which corroborated the Applicant’s Basis of Claim narrative. The RAD assigned this letter no weight or credibility because it was based on the Applicant’s allegations of arrest by the Chinese security police which, as discussed below, the RAD found not credible; the wife said she had been handed the warrant which the RAD found to be fraudulent. The RAD likewise rejected letters submitted by the Applicant’s wife’s sister and the Applicant’s sister because they also referenced what the RAD found to be a fraudulent summons. In my respectful view, these findings are based on credibility which is a permitted ground upon which new evidence may be rejected per *Singh*, and was reasonably made in this case.

[10] Because the RAD did not admit the bulk of new evidence, it denied the Applicant’s request for an oral hearing. In addition, the RAD stated that the request for a *viva voce* communication with the Applicant’s wife and sister in China was also denied because of the fraudulent nature of the communications received namely the fraudulent summons.

[11] The RAD disagreed with several of the RPD’s determination, but upheld the RPD decision for the several reasons:

A. the Applicant was not credible in saying he did not know why he had been deported from the USA given he had illegally acquired a visa allowing him to enter that

country in the first place. In this, the RAD agreed with the RPD. In my view this is a common sense and rational finding tied to the evidence.

B. the Applicant was not credible in claiming that he did not tell authorities in the USA of his fears relating to persecution in China. Likewise, this is tied to the evidence and is a common sense and rational finding;

C. the alleged summons produced by the Applicant to establish he was wanted in China was fraudulent, leading the RAD to conclude that in fact he was not wanted in China, and to the further conclusion that he had not practiced the faith of the Church in China. In this respect, the RAD is entitled to deference because of its familiarity with documentary evidence; the finding is based on findings that the summons was in the wrong structure and format, the print size was incorrect, there were positioning errors, and an aspects of the signature was missing all as measured against undisputed country documentation;

D. the Applicant was not credible in his claim that he was able to leave China notwithstanding its exit controls, known as the Golden Shield, given his allegation he was wanted by authorities for his religious practices; and

E. the RAD found that the Applicant in fact began attendance at the Church in Canada and that his evidence established only attendance and not “genuineness of practice”.

[12] The RAD did, however, accept that the Applicant was who he said he was and over-ruled the RPD on identity. The RAD over-ruled other findings the RPD made against the Applicant

concerning its adverse inference from his visa delay, and its adverse plausibility finding regarding giving his passport to the smuggler.

[13] The RAD did not deal with the *sur place* issue which was based on the new evidence because it was not raised at the RAD. As a procedural matter, while the Applicant identified this in his statement of issues, he made no argument on the point in his memorandum which led the Respondent to make no argument in response. While he was represented before the RAD, the Applicant was not represented when he filed his memorandum. I gave the parties time to file submissions on the point after the hearing, which they did.

[14] The remaining issues, matters of new evidence having been dealt with are (1) were the RAD's findings, including credibility findings, reasonable, and (2) should the RAD have considered the Applicant's as a *sur place* refugee?

[15] In terms of standard of review on reasonableness, in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57 [*Dunsmuir*], the Supreme Court of Canada at para 47 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.

[16] 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.

[17] Both issues in this case involve mixed findings of fact and law and are entitled to the more deferential reasonableness standard: *Dawidowicz v Canada (Citizenship and Immigration),* 2014 FC 115 at para. 23; *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paras 20-22.

A. *Were the RAD's findings, including credibility findings, reasonable?*

[18] On the matter of credibility, 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 (Employment and Immigration),* 1992, 143 NR 238 (FCA). The RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (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.

[19] Insofar as plausibility findings, 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 (Citizenship and Immigration),* 2016 FC 1197 at para 15, Tremblay-Lamer J, citing *Lubana v Canada (Citizenship and Immigration)*, 2003 FCT 116 at paras 10-11, Martineau J [*Lubana*]; *Attakora v Canada (Employment and Immigration)*, [1989] FCJ No 444 (FCA).

[20] In my respectful view, the RAD's credibility determinations affirming those made by the RPD are reasonable, and should not be set aside; they are based on the evidence or were rational plausibility findings tied to the evidence. I will review each:

A. the Applicant was not credible in saying he did not know why he had been deported from the USA given he had illegally acquired a visa allowing him to enter that country in the first place. In this, the RAD agreed with the RPD. Court comment: in my view, this is a common sense and rational plausibility finding on the facts of this case.

B. the Applicant was not credible in claiming that he did not tell authorities in the USA of his fears relating to persecution in China. Court comment: likewise this is a common sense and rational plausibility finding;

C. the alleged summons produced by the Applicant to establish he was wanted in China was fraudulent, leading the RAD to conclude that in fact he was not wanted in China, and to the further conclusion that he had not practiced the faith of the Church in China. Court comment: in this respect the RAD is entitled to deference because of its familiarity with documentary evidence. In any event, the determination is based on findings that the summons was in the wrong structure and format, the print size was incorrect, there were positioning errors, and an aspect of the signature was missing, all as measured against country condition documentation. This finding and its related determinations are reasonable and based on the evidence;

D. the Applicant was not credible in his claim that he was able to leave China notwithstanding its exit controls, known as the Golden Shield, given his allegation he was wanted by authorities for his religious practices. Court comment: this is again a common sense and rational plausibility determination which is supported by the country condition evidence; and

E. the RAD found that the Applicant in fact began attendance at the Church in Canada and that his evidence established only attendance and not "genuineness of practice". Court comment: in my view these findings are also reasonable and based on the evidence.

[21] Viewed as an organic whole, I find that this decision is reasonable based on the *Dunsmuir* tests in that it is justifiable, transparent, and intelligible, and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law in this case.

B. *Should the RAD have considered the Applicant's as a sur place refugee?*

[22] A *sur place* claim was not raised by the Applicant at either the RPD or the RAD. As a procedural matter, while the Applicant identified this as an issue in his statement of issues, he made no argument on the point in his memorandum which led the Respondent to make no argument in response. As previously noted, I gave the parties time to file post-hearing submissions, which they did.

[23] The Minister submits on this new argument issue, as is the case, that Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 places the onus on an appellant to identify in his or her submissions to the RAD the errors that form the grounds of appeal. Given the Applicant failed to satisfy these requirements and made no submissions on the issue, the Minister's position is that the RAD cannot be faulted for not assessing a *sur place* claim.

[24] The Applicant relies on *Jianzhu v. Canada (Citizenship and Immigration)*, 2015 FC 551 [*Jianzhu*] in support of his request that judicial review be granted and the matter returned to the RAD to assess a *sur place* claim. In *Jianzhu* the RAD assessed a *sur place* claim that was not assessed by the RPD because the RAD determined the issue ought to be resolved; this Court decided the RAD should have remitted the matter to the RPD instead for its decision. Here, the RAD made no such assessment, and made no such determination, which makes the case quite

distinguishable. In addition as noted already the RAD proceeded as it did because the Applicant did any raise the issue on his appeal.

[25] This Court has held it is the responsibility of the appellant before the RAD, not the RAD, to establish the RPD erred in a way that justifies the RAD's intervention. It is not the function of the RAD to supplement the weaknesses of an appeal before it: *Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819, per Justice Fothergill. As Justice Zinn put it more recently, "[T]he RAD can hardly be faulted for not considering a submission that was not put to it". See *Dakpokpo v. Canada (Citizenship and Immigration)*, 2017 FC 580.

[26] The Federal Court of Appeal provided the test on this issue some time ago: Décary JA for the panel in *Pierre-Louis v Canada (MEI),* April 29, 1993, A-1264-91 (FCA), quoted by Justice Tremblay-Lamer in *Mbokoso v. Canada (Citizenship and Immigration)*, 1999 FCJ No. 1806 (QL) at para 8, stated: "[I]n this case, we do not believe that the Refugee Division can be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole." This test was affirmed by Létourneau JA in *Guajardo-Espinoza v Canada (MEI)*, 1993, 161 N.R. 132, who added: "[S]aying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow."

[27] The record is therefore important on this issue. In my view, if there is any *sur place* claim at all in this case, it will rely on the alleged new evidence filed by the Applicant. However, as found above, almost all of his new evidence was rejected by the RAD for newness, credibility or relevance, which determinations were made in accordance with *Singh* and were reasonable in the circumstances. The RAD also determined that the Applicant's evidence established only attendance and not "genuineness of practice", which finding was reasonable and for the RAD to make. In this context I am not persuaded that any *sur place* claim emerged perceptibly from the evidence presented as a whole as per the Federal Court of Appeal's test.

II. Conclusion

[28] Standing back and reviewing the RAD decision in the context of the record, I have concluded that the decision of the RAD in relation to findings, including credibility findings and any *sur place* issue taken as an organic whole, falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law as required by *Dunsmuir*. Therefore judicial review must be dismissed.

III. Certified Question

[29] The Minister did not propose a question to certify, however the Applicant requested certification of the following questions:

> Whether RAD is required to conduct the analyses of Sur Place Claim, even if the issue is not specifically raised, or whether the RAD should return the matter to the RPD for that determination when:

> a) the evidence before the RAD establish *prima facie* case for sur place claim and
>
> b) the length of time between the RPD and the RAD decisions is not insignificant.
>
> …

[30] I decline to certify this question for several reasons. First, the question has already been answered by the Federal Court and Federal of Appeal in general terms as noted above. Otherwise it is fact specific and not of general importance. In any event, I am not persuaded that the evidence before the RAD established a *prima facie* case for a *sur place* claim in this case; therefore the question is not dispositive. See generally *Canada (Citizenship and Immigration) v Liyanagamage*, 1994, 176 NR 4 at paras 4-6; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 paras 7 to 10 and *Zazai v Canada (Citizenship and Immigration)*, 2004 FCA 89 at paras 11-12.

[31] Therefore no question of general importance will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is 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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