

Federal Court



Cour fédérale

**Date: 20170810**

**Docket: IMM-53-17**

**Citation: 2017 FC 762**

**Ottawa, Ontario, August 10, 2017**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**GUIMEI HUANG  
JIAHAO WU**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada [IRB], dated December 14, 2016 [Decision],

which rejected the Applicants' claims for refugee protection pursuant to ss 96 and 97(1) of the *IRPA*.

## II. BACKGROUND

[1] The Applicants are citizens of the People's Republic of China. They are a mother [Principal Applicant] and son [Minor Applicant] and allege that they fear persecution for reasons relating to the Principal Applicant's practice of Falun Gong.

[2] The Principal Applicant began practicing Falun Gong in May 2013. She says she was introduced to the practice by a friend who believed that Falun Gong would help her relax and improve her health, which had deteriorated after her husband left her for another woman in 2011 and then disappeared in September 2012. The Principal Applicant claims she attended group practice with her friend on Saturdays and also practiced daily at home.

[3] In May 2014, the Principal Applicant traveled to Japan and was required to work overtime upon her return. Consequently, she did not attend her Falun Gong practice group. On the second day after her return from Japan, the Principal Applicant says her mother-in-law telephoned to inform her that the Public Security Bureau [PSB] had arrested the other four members of her practice group and demanded the Principal Applicant report to them immediately. The Principal Applicant hid at the home of her former schoolmate; during this time, she claims the PSB continued to seek her and also threatened her parents-in-law. The Principal Applicant subsequently hired a smuggler to help her and her son flee to Canada.

[4] On August 22, 2014, the Applicants arrived in Canada and made claims for refugee protection. Their application was heard on July 11 and 26, 2016 and rejected by the Refugee Protection Division [RPD] of the IRB on August 8, 2016. The Applicants appealed the RPD's decision to the RAD.

### III. DECISION UNDER REVIEW

[5] In a Decision dated December 14, 2016, the RAD confirmed the RPD's decision and dismissed the Applicants' appeal.

#### A. *Reason for Joining Falun Gong*

[6] The RAD concurred with the RPD that the lack of corroborative evidence regarding the issue that prompted the Principal Applicant to join Falun Gong, namely her husband's disappearance in 2012, called into question why she would turn to an illegal cult.

#### B. *Practice of Falun Gong*

[7] The RAD concurred with the RPD and drew a negative inference due to the inconsistency between the Principal Applicant's Basis of Claim [BOC] form and testimony at the RPD hearing regarding the frequency of her Falun Gong practice. The RAD rejected the explanation that the inconsistency was due to incorrect instructions from her counsel's staff because the BOC instructions were clear and the Principal Applicant had been represented by competent counsel.

C. *Arrest of Four Co-Practitioners*

[8] The RAD concurred with the RPD that it was not reasonable or plausible for the Principal Applicant to omit from her claim that she had asked her former schoolmate to ask about the other co-practitioners. The RAD rejected the explanation that her counsel's staff had instructed her to omit the information because the instructions were clear to state all important information and the detainment of all her co-practitioners was an integral portion of the evidence.

D. *Copy of Zhuan Falun*

[9] The RAD concurred with the RPD that the inconsistency in the testimony before the RPD regarding where the Principal Applicant kept her copy of her Zhuan Falun book called into question whether she actually had a copy or ever read it. The RPD had found it was unreasonable and implausible that the Principal Applicant would read this complex book once and then cease to study it after previously testifying that she read it daily.

E. *Applicant's Residency and Place of Hiding*

[10] The RAD concurred with the RPD that, on a balance of probabilities, the Principal Applicant had not been in hiding as claimed in May 2014. At the RPD hearing, the Principal Applicant had testified that she had stayed in her original residence because she could not find a hiding place, but then changed her testimony to state that she had stayed with her

former schoolmate. The RPD was not satisfied with the explanation and lack of corroborative evidence in this regard and, consequently, drew a negative inference. The RAD agreed.

F. *Minor Applicant's Expulsion*

[11] The RAD concurred with the RPD's finding that the Minor Applicant was not expelled from school. The Principal Applicant claimed she did not bring up her son's expulsion at the RPD hearing because she misunderstood the question; however, the RPD did not find any corroborative evidence that her son or any of her family members had suffered ill-effects due to her practice of Falun Gong, despite the 8 alleged visits by the PSB. Based on the lack of evidence, the RAD rejected the explanation and agreed with the RPD's finding.

G. *Summons*

[12] The RAD drew a negative inference from the lack of a summons issued by the PSB for the Principal Applicant. While the PSB's policy on the issuance of a summons was not uniform across the country, the RAD noted that it was unreasonable for the PSB to not issue a summons in circumstances where the PSB had been vigorous in pursuing the Principal Applicant by attending her family home up to 8 times and arresting all her co-practitioners, who were allegedly still in detention.

H. *Exit*

[13] The RAD concurred with the RPD's findings that it was not credible or plausible for the Principal Applicant to leave China using her own passport after coming to the attention of the

PSB. The RAD further concluded that this finding undermined the Principal Applicant's credibility regarding her allegations that she was pursued by the PSB as a result of her Falun Gong practice.

[14] In reviewing the documentation, the RAD noted that the Golden Shield, China's national security computer network, contained information about criminal fugitives and passport information as well as extensive tracking and control mechanisms. The documentation indicated that the Golden Shield was used by airport security officials and had been used to detain people who were in the database. Additionally, the documentation indicated that the Golden Shield had been used to track down Falun Gong practitioners.

[15] The RAD then quoted the Exit and Entry Administration Law of China, which requires documentation for all travel and prohibits suspects or defendants in criminal cases from exiting the country. The RAD also referred to other documentation indicating that the Chinese border authorities have implemented exit control procedures and can prevent departure with or without complete control formalities, such as reporting up the hierarchy to the High People's Court. The documentation also states that airport travellers pass through at least four checkpoints that require the presentation of a passport before exiting. Moreover, the Chinese authorities can deny exit if a traveller does not hold valid documentation or is a suspect in a criminal case.

[16] The RAD also reviewed the Principal Applicant's evidence of the smuggler she used to exit China and found it to be vague and lacking in detail. The RAD found it reasonable to expect that the Principal Applicant, an individual expecting to avoid arrest and detention by leaving the

country, would inquire about the services provided by a smuggler, particularly because she had testified that she joined Falun Gong only after being reassured there were safety measures in place. However, the RAD also noted that its plausibility conclusion was based on recent information in the National Documentation Package for China [NDP]. The RAD found it reasonable to expect that the Golden Shield and other systems would be used to prevent the compromise of airport security controls by a single individual, such as an official bribed by a smuggler. Furthermore, the RAD found that the evidence suggested the Principal Applicant's passport had been examined numerous times during her exit and that it was improbable that a smuggler would have known who to bribe in order to facilitate safe passage through the airport.

[17] In support of the RAD's finding, the Decision cited the RAD decision of *X (Re)*, 2015 CanLII 72857 (CA IRB) [*X (Re)*], which found it unlikely that a wanted person could depart China from an international airport using their own passport.

[18] In light of the Principal Applicant's allegation that the PSB continued to pursue her, the RAD found it reasonable to expect the authorities would have entered her information into the Golden Shield. While corruption exists, the documentation indicates that corrupt practices occur in departments concerning the management of funds, not airport security systems. Accordingly, the RAD did not accept that the Principal Applicant could bypass all of the security controls in place.

I. *Sur Place*

[19] The RAD concurred with the RPD that the Principal Applicant had not provided sufficient credible evidence to establish her identity as a Falun Gong practitioner or that she was wanted by the PSB. The RAD also found that the RPD could import credibility findings from the Principal Applicant's testimony regarding her practice in China in the determination of her *sur place* claim. The RAD then found that there was insufficient credible evidence to establish that the Chinese authorities would be aware of the Principal Applicant's alleged Falun Gong activities in Canada.

IV. ISSUES

[20] The Applicants submit that the following are at issue in this application:

1. Does the RAD's analysis give rise to a reasonable apprehension of bias and a jurisdictional error?
2. In the alternative, did the RAD make unreasonable credibility findings?

V. STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the



reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[22] Allegations of bias, if found, can give rise to a breach of procedural fairness and are reviewed under the correctness standard: *Gaziova v Canada (Citizenship and Immigration)*, 2017 FC 679 at para 24.

[23] The standard of review applicable to the RAD's factual findings regarding the Applicants' credibility and assessment of the evidence, including an alleged deliberate omission of jurisprudence, is reasonableness: *Chen v Canada (Citizenship and Immigration)*, 2017 FC 539 at para 19.

[24] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[25] The following provisions of the *IRPA* are relevant in this application:

**Convention Refugee**

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

**Person in need of protection**

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of

**Définition de réfugié**

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

**Personne à protéger**

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire,

torture within the meaning of Article 1 of the Convention Against Torture; or	d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

## VII. ARGUMENTS

### A. *Applicants*

#### (1) Apprehension of Bias and Jurisdictional Error

[26] The Applicants submit that the Decision raises a reasonable apprehension of bias and jurisdictional error, which is in itself sufficient to warrant judicial intervention.

[27] The Applicants argue that the RAD member deliberately omitted jurisprudence contradicting the finding that they would not have been able to leave China on their own passports if they were fugitives. The Applicants submit evidence in the form of an affidavit sworn by Michael Korman, an immigration counsel, that the RAD member deciding the case was aware of jurisprudence that overturned RAD decisions where the plausibility of claimants' exits from China using their own passports was an issue on appeal, including: *Zhang v Canada (Citizenship and Immigration)*, 2008 FC 533 at paras 5, 9, 10 [*Zhang*]; *Sun v Canada (Citizenship and Immigration)*, 2015 FC 387 at paras 13, 26 [*Sun*]; *Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 at para 16 [*Ren*]; *Yang v Canada (Citizenship and Immigration)*, 2016 FC 543 at paras 12-14 [*Yang*]. Mr. Korman presented the aforementioned jurisprudence to the RAD member during the representation of his own clients in prior hearings, thereby demonstrating that the RAD member knew of these decisions. However, the Decision cites only *X (Re)*, above, a decision that is not favourable to the Applicants.

[28] The test for an apprehension of bias is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly: *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394. The Applicants submit that the RAD's conduct creates a perception that the jurisprudence favouring the Applicants was intentionally ignored because Applicants' counsel was unaware of the jurisprudence, thus giving rise to a reasonable apprehension that the RAD member was biased. Furthermore, the Applicants submit that the RAD exceeded its jurisdiction

by intentionally omitting this jurisprudence and became an adversary rather than an impartial decision-maker.

(2) Credibility Findings

[29] In the alternative, the Applicants submit that the RAD made unreasonable credibility findings that warrant judicial intervention.

(a) *Exit from China*

[30] In addition to the submissions on bias above, the Applicants submit that the finding on the plausibility of the Applicants exiting China on their own passports is unreasonable because it is based on the speculative assumption that the smuggler could not ensure their unobstructed passage. Moreover, the RAD acknowledged “isolated incidents of successful evasion” and that “it might be possible for a smuggler to bypass some of the security controls.” The RAD also did not question the RPD’s finding that corruption in China existed. Consequently, the Applicants submit that it is not clear how it is implausible for a smuggler to evade border controls by bribing airport officials and bypassing security measures.

[31] In support of this argument, the Applicants rely on jurisprudence in which the Court has overturned decisions where the issue concerns whether an applicant could exit China via the airport on their own passports: *Zhang; Sun; Ren; Yang*, all above; and *Yao v Canada (Citizenship and Immigration)*, 2016 FC 927 at para 9 [*Yao*].

(b) *Motivation for Joining Falun Gong*

[32] The Applicants submit that it was unreasonable for the RAD to reject their explanation for the lack of evidence concerning the Principal Applicant's husband's departure in 2011 and his disappearance in 2012. The Principal Applicant explained that her family had not provided affidavits because they were illiterate and did not want to get involved. Additionally, her friend told her to forget about the events in China and did not know how to write the contents of the letter. The Applicants submit that it is reasonable to expect that illiterate family and friends will not be able to provide written evidence, and will be reluctant about involvement in an international refugee claim against the country in which they still reside. The RAD's finding is based on pure conjecture and is therefore unreasonable: *Yu v Canada (Citizenship and Immigration)*, 2015 FC 167 at para 12.

(c) *Summons*

[33] The Applicants take the position that it was unreasonable for the RAD to conclude that the Principal Applicant was not credible in her allegations of pursuit by the PSB due to a lack of a summons. The RAD acknowledges that the PSB was not consistent in issuing summonses and does not cite evidence to support its assumption that the PSB would have issued a summons in the Principal Applicant's circumstances. Moreover, this Court has found if the norm in an applicant's region is for the PSB to not leave a summons, then the norm is presumed to be followed regardless of the number of visits from the PSB: *Liang v Canada (Citizenship and Immigration)*, 2011 FC 65 at paras 13-14 [*Liang*]. Furthermore, even if a summons had been issued, there is no evidence that the Principal Applicant would be aware of it since her family

and friends would not necessarily be notified. Accordingly, the Applicants submit that this conclusion is arbitrary, speculative, and lacks transparency.

(d) *Copy of Zhuan Falun*

[34] The Applicants argue that, contrary to the RAD's finding, the Principal Applicant's testimony regarding the whereabouts of her Zhuan Falun book is not an omission or a contradiction. The Principal Applicant had stated that she read the book every day; later, she stated that she hid the book after she finished reading it. This is neither inconsistent nor an omission and is not a basis for an adverse credibility finding.

(e) *Minor Applicant's Expulsion*

[35] The Applicants also submit that the RAD's rejection of the Principal Applicant's explanation for not raising the issue of her son's expulsion from school is unreasonable. The Principal Applicant misunderstood the question and thought she was asked whether her son had ever attended school, not whether he attended after the PSB began their pursuit of her. She did not raise the issue because she did not know there was a misunderstanding.

(f) *Sur Place*

[36] The Applicants take the position that the RAD's assessment of the *sur place* evidence was unreasonable. By the time the analysis reached the *sur place* submissions, the RAD had already determined the Principal Applicant was not credible and her allegations were false, thereby tainting the *sur place* analysis: *Liu v Canada (Citizenship and Immigration)*, 2014 FC

972 at para 8. The Applicants also take issue with the RAD's failure to appreciate that the Chinese authorities monitor the movements of Falun Gong practitioners in Canada, as demonstrated by the documentary evidence, and use facial recognition technology to identify people of interest. This evidence, in conjunction with the fact that the PSB has the Principal Applicant's photograph from her resident identity card, demonstrates more than the mere possibility that the Chinese authorities are aware of her pro-Falun Gong activities in Canada and that she could be identified, as found in *Liang v Canada (Citizenship and Immigration)*, 2016 FC 258 at para 13.

B. *Respondent*

(1) *Credibility Findings*

[37] The Respondent submits that the RAD's credibility findings are reasonable.

(a) *Exit from China*

[38] The Respondent submits that, given the documentary evidence regarding the use and reach of the Golden Shield, it was reasonable for the RAD to find it highly unlikely that a smuggler would have prior knowledge of who to bribe in order to facilitate safe passage through the airport, particularly since the Applicants traveled on their own passports and alleged that the PSB were in continuous and vigorous pursuit. It was also reasonable for the RAD to expect that the local authorities would have entered the Principal Applicant's information into the Golden Shield. Moreover, the RAD was reasonable in finding that despite the possibility that



some security controls could be bypassed, it was highly unlikely that all of the controls could be bypassed.

[39] The Respondent views the Applicants' argument that the RAD should have considered the possibility that all the controls could be circumvented as an alternate inference from the evidence. However, it is insufficient to demonstrate that another conclusion could have been reached; the Applicants have the onus to demonstrate that the RAD's inferences were not supported by the evidence, which they failed to do. Additionally, the Applicants have failed to provide evidence that supports the alternative inferences, *i.e.* how the smuggler could have bypassed all of the security controls.

[40] The Respondent also takes the position that the RAD was reasonable in finding that the Principal Applicant's evidence regarding the smuggler was vague and lacking in detail. It is reasonable to expect that an individual who leaves a country in order to avoid arrest and detention would want to know how the smuggler plans to ensure safe passage.

[41] Furthermore, the Respondent argues that the Applicants' particular reliance on *Sun* and *Ren*, both above, are misplaced. The evidence in *Sun* regarding information sharing is outdated as it is dated July 2009, whereas the RAD relied upon a NDP dated April 29, 2016 that indicates the Chinese authorities have expanded the breadth and complexity of the information-sharing regime and have tightened airport security. *Ren*, on the other hand, is not applicable because the suggestion in that decision was that bribing a single individual would be sufficient in facilitating an exit from China without difficulty; in the present case, the Applicants' arguments imply that

the smuggler could remove the Principal Applicant's information from the Golden Shield. Based on the evidence on the Golden Shield, it was reasonable to expect that the system could not be compromised by a single individual. Additionally, the Principal Applicant's allegation that the PSB continues to pursue her undermines the suggestion that her information was removed from the system.

[42] The Respondent also argues that the jurisprudence cited by the Applicants in regards to this issue does not mean the RAD may never draw adverse inferences when a Chinese fugitive is able to exit the country using their own passport. Each decision must be based on the facts of each case, the analysis conducted, and the documentary evidence before the tribunal. Moreover, there are decisions from this Court in which such an adverse finding has been found to be reasonable: *Ma v Canada (Citizenship and Immigration)*, 2015 FC 838 at para 53 [*Ma*]; *Lin v Canada (Citizenship and Immigration)*, 2008 FC 698 at paras 10, 13, 16 [*Lin*]; *Sui v Canada (Citizenship and Immigration)*, 2016 FC 406 at paras 37-43 [*Sui*].

(b) *Motivation for Joining Falun Gong*

[43] Despite the RPD's request, the Principal Applicant failed to provide evidence to support her husband's disappearance in 2012. As this was the reason she allegedly began practicing Falun Gong, it was reasonable for the RAD to concur with the RPD that the lack of corroborative evidence called into question the Principal Applicant's motives for practicing Falun Gong. The Respondent also argues that the RAD's concern was the absence of any evidence regarding her reasons for joining Falun Gong that would establish her claim, not whether her family and friends were illiterate.

(c) *Summons*

[44] Given the Principal Applicant's assertion that the PSB remained in continuous and vigorous pursuit of her, the Respondent submits that it was reasonable for the RAD to conclude that a summons likely would have been issued if the allegations were true, even though the PSB's policy on the issuance of summonses may not be uniform across China. As in *Lan Cao v Canada (Citizenship and Immigration)*, 2012 FC 1398 at para 35, the documentary evidence did not directly contradict the RAD's finding in this regard. Additionally, the Respondent argues that it was reasonable for the RAD to expect the Principal Applicant would have been aware of a summons if one were issued since she was in communication with her mother-in-law and the PSB had allegedly visited her mother-in-law's home several times.

[45] Nonetheless, the Respondent submits that this issue is not determinative as there were other inconsistencies. The RAD's credibility finding was based on the totality of the discrepancies; as such, even if this is an error the Decision may still be upheld: *Nyathi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119 at para 18.

(d) *Copy of Zhuan Falun*

[46] The Respondent takes the position that the testimony regarding the location of the Zhuan Falun book contains an inconsistency. The Principal Applicant originally stated that she read the Zhuan Falun book at home daily and only went to the practice site on the weekend, but she then stated that she hid the book at the practice site. The RAD rejected the explanation that she had hidden the book after finishing it because she had omitted her completion of the book

and because the book was complex. Given the Principal Applicant's testimony that she read the book daily in China, it was reasonable for the RAD to make its findings on this issue.

(e) *Minor Applicant's Expulsion*

[47] In the Decision, the RAD found no evidence that family members had incurred any harm or threats, which, combined with the Principal Applicant's failure to bring forth her son's alleged expulsion from school at the RPD hearing, supported the finding that the Minor Applicant had not been expelled. The Principal Applicant had the onus of providing corroborating evidence and failed to do so. The Respondent submits that the RAD's findings on this issue are reasonable because the mere fact that an applicant provides an explanation does not mean the explanation must be accepted; accordingly, it was open to the RAD to consider the explanation to determine whether it was sufficient and the Court should not re-weigh the evidence: *Ma v Canada (Citizenship and Immigration)*, 2011 FC 417 at para 39.

(f) *Other Discrepancies*

[48] The Respondent submits that it was reasonable for the RAD to make a negative credibility finding based on a number of inconsistencies, some of which have not been challenged by the Applicants. These unchallenged inconsistencies include: the frequency of the Principal Applicant's attendance at her Falun Gong group practice; the omission of information regarding the arrest of her co-practitioners; and the discrepancy regarding her place of hiding.

(2) Apprehension of Bias

[49] The Respondent argues that the Applicants have not met the high standard required to establish a reasonable apprehension of bias.

[50] First, the Decision is highly factual and contains a detailed analysis of the PSB's information-sharing regime, Chinese airport security control procedures, sectors involving corruption problems, and the Principal Applicant's allegations that the PSB continued to vigorously pursue her after she left China with the assistance of a smuggler. While there are cases in which the Court has disagreed with the RAD's findings regarding an applicant's ability to leave China, there are also cases where the Court has upheld those findings. Each decision is fact-specific and the Decision demonstrates the RAD's grasp of the relevant issues and evidence. The fact that not every factor or piece of evidence was listed in the reasons is not fatal to the Decision or demonstrative of bias: *Ma*, above, at para 53; *Lin*, above, at paras 10, 13, 16; *Sui*, above.

[51] Second, the Applicants' argument regarding this issue effectively disputes the RAD's weighing of the evidence. Evidence that is ambiguous and equivocal does not warrant judicial intervention as long as the conclusion is not wrong on its face: *Conkova v Canada (Citizenship and Immigration)*, [2000] FCJ No 300 at para 5. Moreover, the RAD member in question found that the jurisprudence of *Zhang*, *Ren*, and *Sun*, all above, was inapplicable in both RAD decisions because they were based on dated documentary evidence with limited information on the Golden Shield and Chinese border controls.

(3) *Sur Place*

[52] The Respondent submits the RAD's assessment of the *sur place* claim is reasonable. The RAD did not dismiss the claim on the basis that the Principal Applicant was not a genuine Falun Gong practitioner; instead, the RAD found the Applicants had failed to present sufficient credible evidence that the Principal Applicant's alleged Falun Gong activities in Canada had come to the attention of the Chinese authorities. The Applicants failed to meet the onus of showing an objective basis for their prospective fear of persecution. Given the credibility issues, it was reasonable for the RAD to find the Principal Applicant would not be perceived as a Falun Gong practitioner and, therefore, would not be pursued by the PSB. Additionally, it was reasonable for the RAD to find that a few photos of the Principal Applicant in an unknown place with an unknown group do not constitute sufficient evidence to establish that the Chinese authorities would be aware of her alleged Falun Gong activities.

C. *Applicants' Reply*

(1) *Apprehension of Bias*

[53] The Applicants argue that the RAD's knowing failure to mention contradictory jurisprudence that did not appear to be known to their counsel has nothing to do with weighing evidence. The RAD's failure to consider the conflicting evidence does not constitute re-weighing.

[54] Additionally, the Applicants disagree that the RAD member's omission of *Zhang, Ren* and *Sun*, all above, in previous RAD decisions is immaterial; these RAD decisions have been granted leave for judicial review before this Court based on the same issue. Moreover, the Applicants note that the Respondent is silent on the applicability of *Yang* and *Yao*, both above.

(2) Credibility Findings

(a) *Exit from China*

[55] Contrary to the Respondent's submission, the Applicants submit that *Ren* and *Sun*, both above, are not distinguishable. In both decisions, as in the present case, the only evidence regarding what the smuggler did for the applicants was that bribes were paid to officials: *Ren* at para 6; *Sun* at para 8. Additionally, in *Ren*, the RPD relied on and cited from the same document regarding the Golden Shield that is cited in the Decision; accordingly, the Court's decision dealt with the same evidence that is at issue in the present case. While the evidence regarding the Golden Shield in *Sun* is different from the documentation in the Applicants' case, the Applicants submit that this does not lessen the decision's relevance. In *Sun*, the Court found that it is impermissibly speculative to assume that a fugitive claimant could not exit China using his or her own passport and with the assistance of a smuggler; these are the circumstances of the present case. Finally, the Applicants submit that *Yang* and *Yao* are relevant because they were based on the NDP relied upon in the Decision.

(b) *Motivation for Joining Falun Gong*

[56] The Applicants reiterate that the explanation for the lack of corroborative evidence regarding the disappearance of the Principal Applicant's husband in 2012 is not implausible and argue that the Respondent's position on this matter is without merit.

(c) *Summons*

[57] The Applicants disagree with the Respondent on this issue and argue that there is no evidence whatsoever to suggest that the Chinese authorities serve summonses on criminal suspects, their family members, or even notify suspects or family members of the existence of a summons.

(d) *Copy of Zhuan Falun*

[58] The Applicants reiterate their argument that the Principal Applicant's testimony regarding the location of the Zhuan Falun book is not inconsistent.

(e) *Minor Applicant's Expulsion*

[59] The Applicants argue that the RAD's finding that the Principal Applicant should have brought forth the subject of her son's expulsion at the RPD hearing is illogical because she did not know there was a misunderstanding at that time. Furthermore, the failure to provide corroborative evidence on this matter does not justify a rejection of the Principal Applicant's explanation; corroborative evidence is not required for refugee claimants and the RAD cannot



disbelieve claimants merely due to its absence or make negative credibility findings in the absence of evidence to contradict such allegations: *Ahortor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 705 at para 45.

(f) *Sur Place*

[60] The Applicants submit that the evidence submitted to establish the *sur place* claim consisted of more than just photos of the Principal Applicant practicing Falun Gong publicly in Canada. The Applicants had also submitted documentary evidence that speaks to the vigorous and aggressive measures of Chinese authorities in monitoring the activities of Falun Gong practitioners in Canada. This evidence, which included the Chinese authorities' advanced facial recognition technology and possession of the Principal Applicant's photograph, support the *sur place* claim.

VIII. ANALYSIS

[61] The RAD dismissed the Applicants' appeal because they "failed to provide credible or trustworthy evidence to support [the Principal Applicant's] allegation of FG practice and the PSB being in pursuit as a result." This amounts to a general adverse credibility finding that is based upon a series of negative inferences related to key issues in the Applicants' claim for protection. The Applicants do not challenge some of the RAD's negative findings so that these aspects of the Decision must be taken as reasonable. This includes inconsistencies in how frequently the Principal Applicant attended group Falun Gong practices in China, a lack of information about the arrest of her co-practitioners in China, and discrepancies related to her

place of hiding before she left China. Nevertheless, as the Respondent concedes, “it was the totality of these findings that led the RAD to conclude that the [Principal Applicant] was not credible with respect to her allegations of FG practice in China.”

A. *Exit From China*

[62] One of the central tenets of the Applicants’ case for review is that the RPD made unreasonable credibility findings about how the Principal Applicant could have left China using her own passport given the security measures in place at the airport, and that indeed the RAD went so far as to demonstrate a reasonable apprehension of bias in dealing with this issue because it failed to reference and apply supporting jurisprudence of which the RAD member was aware, but of which Applicants’ counsel was not.

[63] The RAD devotes considerable attention (paras 22-42 of the Decision) to this issue. The heart of the analysis is as follows:

[36] The RAD finds that evidence reveals that the Golden Shield system is an intensive security apparatus that is far-reaching and encompassing. The RAD finds that given the importance of this system to Chinese authorities in monitoring its citizens, it is reasonable to expect that the use of the apparatus is also monitored and that there are redundant systems in place to prevent the system from being compromised by a single individual. In addition, the RAD notes that the Appellant has alleged that the PSB have continued to pursue her after her departure from China. The RAD finds that this allegation undermines the suggestion that her name was somehow removed from the computer system.

[37] The RAD also notes that the evidence suggests that the Appellant’s passport was examined numerous times. The RAD finds it highly improbable that the smuggler would have the prior knowledge of who to bribe in order to facilitate safe travel through each checkpoint. The RAD also notes that Article 51 of the Exit and Entry Administration law of the People’s Republic of China

requires that companies involved in the transportation of goods and passengers in and out of Chinese ports must declare information on the goods and passengers in advance of their departure or entry to the country. Chinese border authorities are provided what is described as “advance passenger information” on arriving and departing passengers. This information contains a number of details of that passenger, including full name, date of birth, gender, nationality, country of residence, travel document type, and passport number, expiry date, and issuing country. With respect to flights into the country, it appears that China maintains a “stop list,” which bars the passenger from boarding the aircraft; however, the NDP remains silent on whether a similar list exists for outbound flights. In any event, it is evident that border authorities are provided detailed information on the passengers aboard outbound flights.

[38] The RAD finds that, in light of the Appellant’s allegation that the PSB have continued to show interest in vigorously pursuing her, it is reasonable to expect that the local authorities would have entered her information into the database to further their efforts to apprehend her.

[39] The RAD is aware that there is evidence in the record which establishes that there is corruption in China. However, the RAD notes that the very comprehensive Australian Refugee Review Tribunal Background paper on official Corruption in China and the other objective evidence in the record makes no mention that corruption extends to the airport security apparatus. The objective evidence states that corrupt practices are evident in many areas of Chinese society but most sources agree that corruption problems are concentrated in sectors with extensive state involvement, such as construction, land use; infrastructure, property development and banking. The former Chinese Premier Wen Jiabao said in March 2012 that “corruption tends to occur frequently in departments that possess great power and in areas where the management of funds is centralised.”

[40] The RAD does not accept the Appellant’s evidence as credible with respect to her passage through an international airport, while wanted by the PSB. The RAD finds that the objective evidence concerning the Golden Shield and other border controls in place in China is compelling and convincing. While it might be possible for a smuggler to bypass some of these security controls, the RAD finds that, based on the evidence in the record, it is highly unlikely that the Appellant could have bypassed all of the security controls in place. The RAD finds, on the basis of its

analysis, that the Appellant's allegation that she was wanted by the police is not credible.

[41] The RAD's finding in this regard is supported in the Refugee Appeal Division decision of *X (Re)*, 2015 CanLII 72857 (CA IRB), addressing similar circumstances:

API [advance passenger information] requirements which have been in effect for years in conjunction with the highly effective Golden Shield program, makes it, on a balance of probabilities, unlikely a wanted person could depart China from an international airport using a passport with his own name, date of birth, and photograph in it. The likelihood of bribing so many people as would be involved in a person's departure is miniscule. From the person selling the ticket, to the check in counter, to the security checkpoint, the customs and immigration people onto the person who checks the Boarding pass, all of these people may be randomly in place and make it nearly impossible for anyone to know who to bribe at what point. It is simply implausible that a wanted man will escape China on his own legitimate documents.

[42] After its own review and assessment of the evidence, the RAD agrees with the RPD's findings and does not find it credible or plausible that the Appellant was able to leave China on her own passport after coming to the attention of the PSB. The RAD further finds that this undermines the credibility of the Appellant's allegations that she was being pursued by the PSB because of her Falun Gong activities.

[footnotes omitted]

[64] The Applicants' criticism of the RAD's handling of this issue is detailed and nuanced and deserves to be quoted in full:

6. To begin, it is submitted that the RAD's analysis of the Applicants' appeal gives rise to a reasonable apprehension of bias and a jurisdictional error. The standard of review applicable is, therefore, correctness. The Applicants appreciate that an allegation of a reasonable apprehension of bias is a serious one. The test for such an apprehension is whether an informed person, viewing and

practically, and having thought the matter through, at it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly. For the reasons that follow, it is submitted that this test has been satisfied in the present case. It is further submitted that the nature of the decision (refugee status) and the importance of the decision to the persons affected militate in favour of a strict application of the test.

7. The apprehension of bias in this case concerns the RAD's deliberate omission of binding jurisprudence contradicting its finding that the Applicant would not have been able to leave China using her own passport if she was really a fugitive. The RAD's assessment of the Applicant's exit from China was lengthy. The RAD dedicated 6.5 pages of analysis (spanning 21 paragraphs) to discussing how the Applicant managed to leave China while being sought by the PSB. Ultimately, the RAD concluded that the Applicant could not plausibly have escaped China using her own passport while being sought by the police. As support for this determinative finding, the RAD cited its previous decision in *X(Re)*, 2015 CanLii 72857 (CA IRB) ("*X(Re)*"). In that case the RAD found it implausible that a wanted person could bribe enough airport officials to facilitate an exit from China using his/her own passport. The RAD relied on *X(Re)* as jurisprudential support for its conclusion that the Applicant could not plausibly exit China under similar circumstances. The problem, however, is that the RAD *knowingly* omitted to mention the recent body of binding Federal Court jurisprudence contradicting the finding in *X(Re)*.

8. The evidence before the Court reveals that the RAD Member was aware of the Court's contradictory jurisprudence. This evidence includes two previous appeals decided by the same RAD Member wherein the contradictory caselaw was raised by counsel and then addressed in the RAD's Reasons and Decisions. In the present case, however, the contradictory Federal Court decisions were *not* referenced by the Applicants' counsel in their appeal Memorandum and, as such, were not addressed by the RAD Member in her decision. It is submitted that the RAD Member's knowing omission to address the body of contradictory jurisprudence favouring the Applicants gives rise to a reasonable

9. As support for this position, the Applicants have submitted an affidavit sworn by Mr. Michael Korman, a barrister and solicitor practicing exclusively in the area of immigration and refugee law. Attached to Mr. Korman's affidavit are two previous RAD decisions rendered by the same Member who decided the Applicants' appeal. In both cases, the appellants' exit from China using their own passports was raised as an issue on appeal, and in

both cases, counsel referenced the recent Federal Court cases overturning RPD decisions wherein such exits were found to be implausible. These Federal Court decisions include:

- **Zhang v. Canada (MCI), 2008 FC 533 (“Zhang”)**, where Madam Justice Dawson stated:

[5] [2.] Second [...] a negative inference was drawn by the Board from Ms. Zhang’s use of her own genuine passport to leave China. The Board focused on Ms. Zhang’s testimony that, while she went through three security checkpoints at the Beijing airport, her snakehead had told her that her name was not “put through” the computer and that he had bribed “the customs.” The Board considered that the documentary evidence indicated that a person leaving China has to pass through at least three security checkpoints and their passport is checked to see if they are wanted by the Public Security Bureau. The Board wrote: “The claimant did not know how many people the snakehead had to bribe. I reject this explanation. Although the People’s Republic of China does have a problem with corruption, I do not find it plausible that the smuggler would be able to bribe possibly hundreds of officials, as there would be no guarantee as to which border police would be on duty or as to which line the claimant (and smuggler) would be directed to.” [...]

[9] As to the second inference, the United Kingdom Home Office, in its 2005 Country Report in respect of China, described “several highly specialized roles” within the smuggling network, including corrupt public officials. The report noted:

**Corrupt public officials** are the authorities in China and many transit countries who are paid to aid illegal Chinese immigrants. Some corrupt government officials act not only as facilitators but also as core members or partners of a smuggling organization. Subjects who belonged to large smuggling groups often indicated that local Chinese officials headed their groups.

[10] Response to Information Request CHN36091.E (February 6, 2001) described the

security and exit control procedures at Beijing airport in the following terms:

Theoretically the travel documents should be checked twice and if travel to Canada 3 times. The documents would be checked by the airlines when the passenger checks in for the flight, they are then checked by the Frontier Inspection when the passenger proceeds to the exit control. On flights direct to Canada the travel documents are supposed to be checked at the boarding gate by the airline.

The exit control system at Beijing Airport is computerised and all names are supposed to be checked through the computer system. Like any system, errors can be made or names not entered correctly so, people who are wanted should not be able to depart, but it could happen.

[11] In view of this evidence, the Board engaged in speculation when it concluded that possibly hundreds of officials had to be bribed. One official with access to the computer system would be sufficient.

- **Sun v. Canada (MCI), 2015 FC 387 (“Sun”)**, where Mr. Justice de Montigny stated:

[13] Concerning the smuggling story, the Board found it unlikely that the Applicant would be able to travel within China and to leave the country on his own passport without a hitch while an arrest warrant was allegedly issued against him. The Board noted that the country condition documentation demonstrates that a national policing database exists. Although recognizing that bribery is prevalent in China, the Board did not accept the explanation that the smuggler had bribed a customs agent, noting that if the PSB had been so intent on arresting him, then he would have been arrested regardless of a single bribe. [...]

[26] **The Board’s finding that it was implausible the Applicant would be able to leave China undetected on his own genuine passport while an arrest warrant was issued against him, especially after the PSB had allegedly visited his**

house eight times looking for him, is equally questionable. The Board based its finding mainly on a Response to Information Request reporting the existence and expansion of a national Chinese policing database used by the PSB and at ports of entry and exit of the country. The same document also mentions that challenges remain with respect to information sharing between regional police units, and the Board itself recognizes that there is wide administrative discretion across the country and that bribery is prevalent in China. It is well established that implausibility findings may only be made in the “clearest of cases” (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, at para 7), where “the facts as presented are either so far outside the realm of what could reasonably be expected that the trier of fact can reasonably find that it could not possibly have happened” (Lorne Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992), s 8.22, cited in *Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653, at para 24). In light of the fact that the Board itself recognized that bribery is prevalent and that it is possible that information would not be effectively shared, the Board was not entitled to conclude that the Applicant’s story is implausible. It was equally entirely speculative to find that the Applicant could not plausibly have travelled through China to apply for a US visa without being detected; this finding does not rest on any evidence. [emphasis added]

- **Ren v. Canada (MCI), 2015 FC 1402 (“Ren”)**, where Mr. Justice Boswell found that:

[16] ... It is not implausible that a person could leave China on their own passport with the assistance of a smuggler who bribed the appropriate person; “one official with access to the computer system would be sufficient” (*Zhang* at para 11). The Applicant’s explanation that he engaged a smuggler who told him to go to a particular exit is not implausible and can account for why he was able to leave on his own passport.



- **Yang v. Canada (MCI), 2016 FC 543 (“Yang”)**, where Mr. Justice Phelan found that:

[12] ... the determination that the Applicant could not leave China on her own passport is simple speculation on how one can leave China. There was no evidence that one had to bribe every official in the “chain of departure”. The decision does not address the Applicant’s evidence that the customs officer did not scan her passport or type anything into the computer but merely stamped the passport.

[13] Before finding it implausible to exit China, the RAD (and RPP) had to address the Applicant’s evidence. If it believed, there must be an explanation of how it was implausible for her to leave; if not believed, there must be an explanation for that credibility finding.

[14] There was sufficient evidence of corruption of officials and a bribery scheme that the RAD had to explain why it was not reasonable that such occurred in this case. As found by Justice Boswell in *Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 (CanLII) at para 16, “[i]t is not implausible that a person could leave China on their own passport with the assistance of a smuggler who bribed the appropriate person;”.

10. These Federal Court decisions were addressed by the RAD Member in both of the appeals referenced by Mr. Korman.<sup>1</sup> They were, therefore, clearly known to the RAD Member. Yet, as stated above, they were not addressed in the RAD’s reasons in the present case. This deliberate omission of relevant and contradictory jurisprudence is troubling. As stated by the Court in *Cipak, supra*, the RAD’s omission would cause the well-informed person, acting reasonably and viewing the matter realistically and practically to ask “what was the decision-maker trying to achieve?” It is submitted that, in all of the circumstances of the case, the RAD’s conduct creates a perception that it intentionally ignored caselaw favouring the Applicants’ position because it appeared that this caselaw was not known to the Applicants’ counsel. This, in turn, gives rise to a reasonable apprehension that the RAD Member was biased in her assessment of the Applicants’ appeal. It is further submitted that the RAD exceeded its jurisdiction by intentionally omitting jurisprudence favourable to the Applicants and, thereby, stepping into the shoes of an adversary rather than an impartial

decision maker. It is respectfully requested that this Application be allowed on this basis alone.

## **II. In the Alternative, the RAD Made Unreasonable Credibility Findings**

11. In the alternative, it is submitted that the RAD made unreasonable credibility findings that fall outside the range of possible acceptable outcomes, which are defensible in respect of the facts and law. The RAD's credibility findings are reviewable on the reasonableness standard.

### ***Exit from China***

12. The issue of the Applicants' exit from China has already been canvassed above. However, in addition to the reasonable apprehension of bias created by the RAD's assessment of this issue, the RAD's finding that the Applicant could not plausibly have circumvented China's border security measures while using her own passport was also unreasonable. This finding was premised on the speculative assumption that the Applicant's smuggler did not have the means to ensure her unobstructed passage out of China. The RAD failed to appreciate that the whole purpose of hiring a smuggler is to accomplish that which one cannot accomplish on one's own. The RAD's speculative conclusion was particularly unreasonable given its explicit acknowledgment that "there are isolated incidents of successful evasion" and "it might be possible for a smuggler to bypass some the security controls" at the airport. It was also incompatible with the RPD's finding (which the RAD did not disturb) that "there is systematic corruption in China and airport officials can be bribed" and "authorities in China do not always apply regulations evenly." With respect, if it is uncontroversial that there is fraud and corruption when it comes to procedures at Chinese airports, that "officials can be bribed" and that "successful evasion" of border security is possible, then it is entirely unclear how the RAD could find it implausible that the Applicant's smuggler had means of evading border controls by bribing airport officials and bypassing security measures. The RAD's finding is arbitrary and lacks transparency.

13. It is also instructive to note that in addition to the Federal Court's decisions in *Zhang, Sun, Ren* and *Yang, supra* (which were deliberately omitted from the RAD's analysis), the Federal Court recently considered this issue yet again in *Yao v. Canada*, 2016 FC ("Yao"), where Justice Locke stated as follows:

[9] The RPD found that the applicant's ability to pass through the airport without difficulty supported the finding that his passport was genuine. The applicant submitted that this was possible because the smuggler made arrangements for him, but the RPD found the preponderance of documentary evidence stating that airport authorities conduct thorough screening of passengers to be more convincing. The RPD acknowledged that there is corruption in China and that authorities do not always apply the regulations evenly, but preferred the unbiased country documentation to the applicant's testimony. The RPO found that on a balance of probabilities, the applicant was not wanted by the PSB. [...]

[18] I note here that the RPD even acknowledged systematic corruption in China and the fact that regulations are not always applied evenly. The RPD's findings seem to require a belief that smugglers cannot be of assistance to citizens who are wanted for arrest and who want to leave China. In my view, the evidence did not support such a belief.

14. The RAD's findings in the present case are unreasonable for all of the same reasons outlined by the Court in *Sun, Ren, Yang* and *Yao*. The RAD's unreasonable determination on this issue was fatal to the Applicants' entire claim and is, therefore, sufficient to warrant the Court's intervention.

[footnotes omitted]

[65] The Respondent provides a spirited defence of the RAD's approach that, once again, deserves to be examined in full:

12. The Applicants argue that the RAD should have entertained the possibility that the smuggler could have circumvented all the security measures and, everyone at the checkpoints. This is an alternative inference that the Applicants wanted the tribunal to make. However, in assessing the reasonableness of a decision-maker's credibility findings, it is not sufficient for the Applicant to demonstrate that different conclusions could have been reached on the evidence. To show that the RAD's inferences are unreasonable,

the Applicants must demonstrate that the inferences made by the tribunal in this case are not supportable in any way on the evidence. The Applicants have failed to do so. Furthermore, the Applicants have also failed to put forth any evidence in support of the alternative inference proposed by them. The onus is on them to demonstrate that the smuggler could have bypassed all the security measures in place. They have failed to so indicate. The Applicants' arguments on this issue should, therefore, be dismissed.

13. Also, as further explained by the RAD, the Applicant's evidence regarding the smuggler was vague and lacking in detail. The tribunal found it reasonable to expect that an individual who is trying to avoid arrest and detention by leaving the country would want to know what services the smuggler she was engaging would be able to provide and what steps would be taken to ensure her safe passage from China. This finding also falls within a range of possible and acceptable outcomes and is reasonable.

14. Lastly on this point, the Applicant's reliance on this Court's decisions in *Sun* and *Ren* is misplaced. In *Sun*, the evidence relied on by the Board is now outdated. In that case, the evidence on information sharing was primarily a Response to Information Request dated July 2009. In this case, the RAD relied on very recent National Documentation Package dated April 29, 2016. This more recent evidence indicated that the authorities in China have expanded the breadth and complexity of its information sharing regime and have tightened security at airports.

15. In *Ren*, the suggestion was that bribing one person would be sufficient to allow the Applicant to exit China without difficulty. However, as explained by the RAD in the within case, the suggestion is not applicable here. The Applicants' arguments regarding the smuggler implied that a bribe could facilitate the removal of police interest in the Female Applicant from the Golden Shield computer system. However, the evidence before the RAD in this case demonstrated that the Golden Shield is an intensive security apparatus. It is, therefore, reasonable to expect that the use of the apparatus is also monitored and that there are methods implemented to prevent the system from being compromised by a single individual. In addition, the RAD noted that the Applicant had alleged that the PSB has continued to aggressively pursue her even after her departure from China. This undermines the suggestion that her name was somehow removed from the computer system.

16. In any event, none of the cases cited by the Applicants stand for the proposition that the RAD may never draw an adverse

inference when a Chinese fugitive is able to exit on their own passport. The reasonableness of the conclusion depends on the facts of each case, the analysis conducted and the documentary evidence before the tribunal. Indeed, in *Ma*, Justice Kane concluded that “[t]he Board’s finding that it was implausible that the applicant would be able to leave China undetected using her own genuine passport, if indeed she was wanted by the PSB, is reasonable.”

[66] I agree with the Respondent that the RAD’s negative findings are based upon factual conclusions and are not driven by a reliance on *X (Re)*, above, to the exclusion of other jurisprudence. This does not mean, of course, that other jurisprudence is not relevant to the issue of whether the RAD’s factual conclusions are reasonable. In this regard, I am an adherent to Justice Brown’s approach as set out in *Yan v Canada (Citizenship and Immigration)*, 2017 FC 146:

[20] The RAD reviewed the most recent documentary evidence and noted the fact of corruption in China. On the facts in this case, the RAD distinguished *Zhang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 533, Dawson J, as she then was, *Sun v Canada (Minister of Citizenship and Immigration)*, 2015 FC 387, de Montigny J and *Ren v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1402, Boswell J. In my view, the RAD acted reasonably in this respect because the country condition information before this RAD was more up to date and was not before the Court in the earlier decisions, specifically in regard to China’s exit controls and the Golden Shield. In my respectful view, decisions concerning China’s exit controls based on earlier or different country condition evidence, while important for the principle that each case must be determined on the evidence, are not determinative of subsequent applications such as this. These determinations are both fact-driven and findings in respect of which the RPD and RAD are entitled to a degree of deference given they are both specialized tribunals. In this case, more recent evidence supported the RAD’s determinations in this respect.

[67] In my view, then, the RAD's approach in this case does not give rise to a reasonable apprehension of bias. The issue for the Court is solely that of reasonableness. When I look at the RAD's factual assessment of this issue, the following points of concern arise:

- a) Corrupt public officials are paid to aid illegal Chinese immigrants and are a part of the smuggling groups who have knowledge of the security systems in place. As in *Yang*, above, "There was sufficient evidence of corruption of officials and a bribery scheme that the RAD had to explain why it was not reasonable that such occurred in this case." In the present Decision, the RAD excludes this consideration by referring to the Australian Refugee Tribunal Background paper on official Corruption in China "and other objective evidence in the record" that "makes no mention that corruption extends to the airport security apparatus." 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." In fact, the Australian Government's report relied upon by the RAD says that "Corruption is reportedly endemic in China's police force" which presumably includes the PSB. This should have been acknowledged and assessed by the RAD;
- b) The RAD surmises and speculates, without evidence, that the use of the security apparatus "is also monitored and that there are redundant systems in place to prevent the system from being compromised by a single individual." This undermines the RAD's implausibility findings;
- c) The RAD also relies on the allegation that the PSB continue to pursue the Applicants to undermine "the suggestion that the name was somehow removed from the computer system." This is combined with the finding that the Principal Applicant's passport was examined numerous times and "it is highly improbable that the smuggler would have the prior knowledge of who to bribe in order to facilitate safe travel through each checkpoint." Nevertheless, the RAD acknowledged "isolated incidents of successful evasion" and neglects the warnings in *Ren*, and *Zhang*, both above, that "one official with access to the computer system would be sufficient." The RAD also characterizes the Applicants' evidence of the smuggler as "vague and lacking in detail":

[34] The RAD also finds that the Appellant's evidence of the smuggler was vague and lacking detail. The RAD finds it is reasonable to expect that an individual who is trying to avoid arrest and detention by leaving the country would want to know what services the smuggler she was engaging was able to provide and what steps would be taken to ensure her safe passage from China. The RAD notes that the Appellant has alleged that she was aware of the risks of engaging in Falun Gong and only joined after she was confident there were security measures in place to ensure her safety. In light of this, and given her apparent confidence and sophistication, it is reasonable to expect she would seek similar assurance from the snakehead.

The Applicants' evidence on the role of the smuggler is summarized in the RPD decision at para 22:

The claimant left China using a recently issued passport in her own name. She stated at the hearing that she left China on August 15, 2014 and flew to the US. She stated that she used the services of a smuggler. She was asked at the hearing what the smuggler did for her and she replied that he helped her to get a US visa. She was asked why she did not apply for the visa herself and she replied that she was in hiding and the PSB was looking for her. She said that the smuggler helped her to fill out the application and that she gave him her hukou and a photo. The claimant also said that the smuggler helped her to clear customs, that he gave her a badge and told her to go to number three checkpoint. She said that the badge was like a customs pass.

I don't see anything vague about this evidence and the Principal Applicant does not appear to have been asked for any more detail than she gave;

- d) The RAD cites its previous decision in *X (Re)*, above, to support its conclusions of implausibility but neglects to address Federal Court jurisprudence in such cases as *Zhang, Sun, Ren, Yang, and Yao*, all above, that conflicts with at least some of the RAD's conclusions in this case.

#### B. *Other Areas of Concern*

[68] It also seems to me that the RAD makes the following material errors:

- a) The RAD mischaracterizes the Principal Applicant's explanation as to why she could not obtain corroborative evidence about her husband's disappearance from family and friends. The Principal Applicant didn't just say that these people were illiterate, she explained that they "did not want to get involved" and this is readily understandable and plausible given what could happen to them in China if they assist the Principal Applicant with her Falun Gong refugee claim;
- b) There is no real evidence to support the RAD conclusion that the "lack of a summons or arrest warrant, when one should reasonably been issued, damages the credibility of the [Principal Applicant]." See *Liang*, above, at paras 11-14;
- c) There were no real inconsistencies or omissions in the Principal Applicant's testimony about her Zhuan Falun text;
- d) The Principal Applicant's evidence about her son's expulsion could not have been brought before the RPD because, as the Principal Applicant makes clear in her affidavit,

she could not have been aware of any misunderstanding about her evidence before the RPD.

[69] The RAD also based its cumulative negative credibility finding on other factors that the Applicants' do not challenge. However, I think the above are sufficient to render the Decision unsafe and unreasonable.

C. *Sur Place Claim*

[70] The RAD's findings on the *sur place* aspect of the Applicants' claim are tainted by the negative credibility findings from the rest of the Decision. In my view, then, the *sur place* claim also needs to be reconsidered in light of the reviewable errors identified above.

[71] I am aware that similar cases to the present have arisen frequently in the Court, particularly with regard to the issue of whether claimants are able to exit China with their own passports given the Golden Shield system in place. Decisions have gone both ways. In my view – and the Respondent acknowledges this – it really depends upon the facts and evidence adduced in each case. In the present case, I think there are sufficient concerns about the factual findings of the RAD, as outlined above, to require a reconsideration of this case. This does not mean that I am establishing any kind of precedent that can be applied in future cases.

[72] Counsel agree there is no question or certification and the Court concurs.



**JUDGMENT IN IMM-53-17**

**THIS COURT'S JUDGMENT is that**

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RAD;
2. There is no question for certification.

“James Russell”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-53-17

**STYLE OF CAUSE:** GUIMEI HUANG ET AL v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 26, 2017

**JUDGMENT AND REASONS:** RUSSELL J.

**DATED:** AUGUST 10, 2017

**APPEARANCES:**

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