Federal Court Cour fédérale

Date: 20181012

Docket: IMM-5317-17

Citation: 2018 FC 1027

Ottawa, Ontario, October 12, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

HUOQUAN LIU
YINYING XIE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr. Liu and Ms. Xie, are husband and wife and citizens of China. On arriving in Canada in 2012, they initiated a claim for protection on the grounds that they faced a risk of persecution resulting from their pursuit of Falun Gong. The Refugee Protection Division [RPD] refused the claim, finding they were neither Convention refugees nor persons in need of

protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The applicants had no right to appeal the RPD decision to the Refugee Appeal Division [RAD].

[2] The applicants submit that in refusing the claim, the RPD erred in rendering unreasonable plausibility findings and concluding they were not wanted by Chinese authorities. They submit the RPD also erred by relying on their knowledge of Falun Gong to assess the genuineness of their beliefs and their *sur place* claim. The applicants also raised but did not pursue the constitutionality of a statutory provision denying them recourse to the RAD.

[3] The application is allowed. As set out in greater detail below, the RPD erred in relying on unreasonable plausibility findings, an error that undermines the reasonableness of the decision as a whole.

II. Background

[4] Ms. Xie reports that she was introduced to the practice of Falun Gong in 2010 by a friend as a means of assisting her with health issues. Mr. Liu also began to practice with her Falun Gong group. They subsequently learned that Mr. Liu's sister was also a practitioner, but she practiced in a separate group.

[5] In May 2010, a member of Mr. Liu's sister's group was arrested. The sister's group suspended their group practice, as did the group the applicants were practicing with. The sister's group resumed practice in November 2010, and the applicants' group resumed their activities in

January 2011. In February 2011, Mr. Liu's sister's group was raided and two members were arrested. Again, both groups suspended their group practice.

[6] The applicants report that they continued to practice Falun Gong at home. In August 2011, their group again began to practice together.

[7] In February 2012, upon return to China from a trip to Europe, the applicants were met by family at the airport. They were told not to go home as their Falun Gong group had been discovered, members had been arrested, and the Public Security Bureau [PSB] was looking for the applicants. The applicants went into hiding. They then fled China with the assistance of a smuggler and have been told by family that the PSB continues to look for them.

III. The Decision under Review

[8] The RPD found that credibility was the determinative issue, stating it had some significant credibility concerns with the evidence provided.

[9] The RPD raised a plausibility concern surrounding Ms. Xie's decision to practice Falun Gong before pursuing other forms of qigong and despite her awareness of the risks of arrest and imprisonment. The RPD also observed what it described as vague responses from Mr. Liu in answering the RPD's request that he describe what he meant when reporting he had decided to practice Falun Gong to strengthen his mind and body.

[10] Mr. Liu testified that the PSB had come looking for him on 15 or 16 occasions without leaving a summons or warrant. The RPD found this testimony was inconsistent with Federal Court jurisprudence that discussed the PSB's method of operating. It found, on a balance of probabilities, that if the PSB had visited as often as reported, a summons would have been left and an arrest warrant issued. The RPD drew a negative inference from the applicants' failure to produce a summons or arrest warrant.

[11] Concerning the applicants' exit from China, the RPD noted the evidence showed that even in 2011 and 2012 the PSB had established a computer network called the Golden Shield which connected the PSB to international airports, and that the applicants had left from a major city in China. The RPD found it reasonable to assume that the airport they used would have been connected to the Golden Shield and that if the applicants were wanted by the PSB, they would have been identified at the time. The RPD concluded that as the applicants were able to leave using their own passports this suggested that they were not wanted by PSB.

[12] The RPD then concluded, based on the absence of documentation and the ability of the applicants to leave China that (1) they were not being pursued by the PSB in China; (2) it was unlikely that they were Falun Gong practitioners in China; and (3) they made a fraudulent claim for protection when they arrived in Canada.

[13] The RPD then addressed the applicants' knowledge of Falun Gong and concluded that, while they did have some knowledge of the practice, their knowledge was, "on a balance of probabilities…less than one would reasonably anticipate for persons who allegedly practiced for

more than five years." The RPD gave little weight to letters and photos seeking to establish their ongoing practice in Canada, noting the truth of the letters could not be tested and the photographs only established participation in gatherings where Falun Gong exercises were performed.

[14] The RPD noted that jurisprudence allowed for credibility concerns arising from in-China evidence to be considered in assessing the *sur place* claim. The panel then concluded that in light of its concerns with the in-China evidence, the in-Canada evidence "only reflects your need to support a refugee claim, and there is insufficient evidence to find that you are genuine practitioners."

[15] The RPD concluded that the applicants were not refugees or persons in need of protection and dismissed their claims.

IV. Issues and Standard of Review

[16] The applicants raise a number of discrete concerns, but all involve the reasonableness of the RPD's credibility findings and treatment of the evidence. The "RPD's credibility finding[s] and assessment of evidence are reviewable on the standard of reasonableness" (*Devanandan v Canada (Citizenship and Immigration)*, 2016 FC 768 at para 15).

V. Analysis

[17] The applicants take issue with the RPD's findings that they are not being sought by the PSB in China, that they were not Falun Gong practitioners in China, and that their practice of Falun Gong in Canada was not genuine. They also take issue with the RPD's finding that it was implausible in light of the risks related to the practice of Falun Gong that the applicants would have decided to pursue the practice without first having tried other forms of qigong.

[18] The respondent submits that the implausibility finding was reasonable but that in any event, it was a minor finding that cannot be said to have affected the rest of the panel's findings. I disagree. The RPD's implausibility finding is the only issue I need address.

[19] In *Chen v Canada (Citizenship and Immigration),* 2015 FC 225 [*Chen*], Justice Donald Rennie noted at paragraphs 14 and 15 that plausibility findings should only be made in the clearest of cases and caution needs to be exercised where evidence is rejected on the basis of plausibility:

> [14] Plausibility findings should only be made in the clearest of cases, such as when the applicant's testimony is outside of the realm of what could reasonably be expected or when the documentary evidence demonstrates that the events could not have taken place as alleged. Plausibility findings are predicated on a conclusion that the description of events is so unusual or beyond the scope of common experience and commons sense that they are disbelieved. Plausibility findings are contrasted with findings predicated on inconsistency within the applicant's own testimony, between the applicant's testimony and other documents, material omissions, the lack of precision in testimony or the absence of documentation where documents or corroborative evidence might normally be anticipated.

> [15] Caution must be exercised when rejecting evidence on the basis of plausibility; *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, para 7. There are two reasons for this. First, it is inherently subjective. Second, as I noted in *Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at para 11: "Refugee claimants come from diverse backgrounds and the events described in their testimony are often far removed from the ordinary life experience of Canadians. What appears implausible from a Canadian perspective may be ordinary or expected in other countries."

[20] In finding it implausible that the applicants would pursue the practice of Falun Gong before having pursued other forms of qigong, the RPD appears to be of the view that individuals in China turn to Falun Gong as an option of last resort. The RPD does not cite any evidence to support this view, and there is nothing in the applicants' evidence that appears consistent with this view.

[21] The applicants reported that they turned to Falun Gong due to health concerns and on the recommendation of a trusted friend. This explanation is not outside the realm of what could reasonably be expected, nor does the documentary evidence indicate the decision to pursue the practice of Falun Gong could not have arisen in the circumstances described by the applicants. Instead, the implausibility finding appears to flow from the panel member's subjective view "that the description of events is so unusual or beyond the scope of common experience and commons [sic] sense that they are disbelieved" (*Chen* at para 14).

[22] In reaching this conclusion, the RPD failed to heed Justice Rennie's caution—plausibility findings are inherently subjective, and what may appear implausible from a Canadian

perspective may not be implausible in a different social and cultural context. The implausibility finding was unreasonable.

[23] Not only was the implausibility finding unreasonable, it undermines the reasonableness of the remainder of the RPD's analysis. The evidence relating to an arrest warrant, summons, and the effectiveness of the Golden Shield was mixed. In light of the mixed evidence, I am unable to conclude that the RPD would have come to the same conclusions when considering the reported PSB activity and the absence of a summons and arrest warrant. In reaching its conclusions on the *sur place* claim, the RPD imported its in-China findings and concerns, also tainting the reasonableness of the *sur place* findings.

[24] In summary, the RPD's analytical starting point was that the applicants' story was implausible. This unreasonable implausibility finding leaves the Court to wonder whether the RPD was open to a consideration of the mixed evidence. The implausibility finding undermines the transparency, intelligibility, and justifiability of the decision.

VI. Conclusion

[25] The application is granted. The parties have not proposed a question of general importance and none arises.

JUDGMENT IN IMM-5317-17

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is returned for redetermination by a different decision-maker; and

3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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