

Federal Court



Cour fédérale

Date: 20190102

Docket: IMM-5482-17

Citation: 2019 FC 2

Ottawa, Ontario, January 2, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

ZHI QIANG HE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Zhi Qiang He, is a citizen of the People's Republic of China. He claimed refugee protection shortly after entering Canada in September 2010 on the basis of his fear of persecution in China as a Christian. His claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada in September 2013 but in January 2015 this determination was set aside on judicial review and a new hearing was ordered. That hearing

took place on December 5, 2017. For reasons delivered orally on the same day, the member rejected the claim and also found that it was manifestly unfounded. The applicant now applies for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the following reasons, this application for judicial review is allowed.

II. BACKGROUND

[3] The applicant set out the grounds for his claim for protection in a Personal Information Form [PIF] completed in October 2010. A lawyer in Montreal assisted the applicant with completing the PIF. The applicant completed a second PIF in October 2012. A lawyer in Toronto assisted with this one. The second PIF included a new narrative which was substantially the same as the original one but which contained a number of details that had not been provided before.

[4] The applicant was born in 1986 in Jiang Jing Town, Fuqing City, Fujian Province. He trained and worked as a hair stylist.

[5] According to the applicant, he was introduced to Christianity by his parents in June 2007. He was living with his parents in Jiang Jing at the time. The applicant claimed that he had been baptized in October 2008. He attended a state church with his parents for about six months but in late 2007 his parents established a church in their home. By 2010, about forty people were

attending services there. The applicant was living elsewhere for a time but still attended services at his parents' home about once a month.

[6] The applicant states that his parents' house church was raided by 20 to 30 members of the Public Security Bureau [PSB] during a service on April 18, 2010. The applicant was present. He and another member of the congregation, Yu Xi, escaped together through the back door of the house. The applicant hid in a mountain cave until darkness fell, then went to his aunt's home. The applicant learned that his parents and many other members of the congregation had been arrested. The applicant also learned that the PSB had gone to his home to arrest him. The PSB questioned his grandmother about his whereabouts and religious activities. The applicant also learned that the PSB were accusing him of being complicit with his parents in their religious activities and of being one of the leaders of the house church. The PSB had ordered him to report to them the next day.

[7] When the applicant did not report to the PSB, they put up a Wanted Circular on the walls of buildings in his village. Concerned for his safety, the applicant's aunt helped the applicant find a smuggler to assist him to leave the country. The applicant flew from Beijing to Malaysia on May 13, 2010, travelling on a passport provided by the smuggler. He remained in Malaysia until around June 10, 2010, when he left and travelled a route (which he could not reconstruct) to Montreal on a different false passport.

[8] According to the narrative included in his second PIF, which he completed in October 2012, the applicant had learned recently that in October 2010 his parents had been

sentenced to three years' imprisonment. Other members of the congregation who were arrested on the day of the raid had been detained for 15 months and then released. The applicant states that he also learned recently that the PSB were still looking for him.

[9] The applicant filed several documents in support of his claim, including the following:

- A document in Chinese purporting to be a Wanted Circular issued by the PSB of Fuqing City dated April 22, 2010. The circular had the applicant's photograph on it. It described the applicant and his alleged connection to his parents' house church. It asked anyone with knowledge of the applicant to contact authorities. At the 2017 hearing of the refugee claim, the applicant testified that his grandmother had removed the circular from a wall and given it to him.
- Two documents in Chinese purporting to be Release Certificates for his parents issued by the PSB of Fuqing City on October 18, 2013. Both stated that their respective subjects had been "sentenced to three years' imprisonment by the People's Court of Fuqing City due to being involved in evil cult organization and having sabotaged Public Security order." Both stated that "the term of imprisonment is over" and that the respective subjects are "released by the Fuqing Public Security Bureau according to Article 27 of the Criminal Procedure Law" of the People's Republic of China. The applicant was not asked how he obtained these documents at the 2017 hearing. He stated at the 2013 hearing (a transcript of which was before the member) that a family member (it is not entirely clear who) had mailed him these documents in Canada.

- Two documents in Chinese purporting to be Notices issued by the Jiang Jing Branch of the PSB of Fuqing City dated October 19, 2013, to the applicant's parents. The documents stated that each of them had been released after serving three years' imprisonment due to their "illegal evil religious activities" and that they were required to report once a month "for the further reforming of the ideology [*sic*]." The applicant was not asked how he obtained these documents at the 2017 hearing. He stated at the 2013 hearing that a family member (again, it is not entirely clear who) had mailed him these documents in Canada.
- Two letters from Reverend David Ko of the Living Stone Assembly in Scarborough, one dated October 5, 2012, the other December 2, 2017. Reverend Ko attested to the applicant's attendance at his church, his ability to answer "Christian questions" correctly, and his having been baptised at the Living Stone Assembly on April 16, 2011.

III. DECISION UNDER REVIEW

[10] The RPD member found that the applicant had established his personal identity and citizenship. The member concluded, however, that the applicant is not a Convention refugee or a person in need of protection because he is not a genuine Christian. The member also concluded that the claim is manifestly unfounded.

[11] The member rejected the applicant's claim for four principal reasons.

[12] First, the member found that the applicant was not credible because of material differences between his various accounts of events that formed the basis of his claim for protection. He omitted the fact that he had been baptised in China in October 2008 in his original PIF. He did not mention Mr. Xi in his original PIF but, according to his second PIF, Mr. Xi had pulled him out of the house after the PSB entered and the two of them fled together. In his testimony before the RPD, the applicant did not mention Mr. Xi until he was asked a direct question about him by the member. In his original PIF the applicant described members of the PSB as entering the house “without a word.” In his second PIF, he stated that he heard the PSB say “beat them” when they entered. In his testimony before the RPD, the applicant first stated that the PSB told them not to move but then said they were silent as they entered. As well, the applicant gave inconsistent or, at least, confusing accounts of where he was living at the time of the police raid.

[13] Second, the member drew a “negative credibility inference” from the fact that the applicant had failed to provide documentary evidence to corroborate his claim that he was a practicing Christian in China – in particular, documentary evidence showing that he had been baptised in 2008. The member found that there was “no reason why [the applicant] could not have gone back to his parents, or his Pastor, or somebody, to get documentary evidence to prove that he was baptized in China.” When asked directly why he had not produced any such evidence, the applicant had responded that their religious practices had been kept secret at the time. The member noted that while that may once have been so, this was no longer necessary, given that they had been discovered several years ago. The member also notes but does not

expressly draw any conclusion from the fact that the applicant had not produced a PSB summons.

[14] Third, the member found that the documentary evidence the applicant did produce – the Wanted Circular and the PSB documents pertaining to his parents’ detention and release – were fraudulent because their use is not provided for under Chinese criminal procedure.

[15] Fourth, the member was not satisfied that the applicant is a genuine Christian. The member recognized that the applicant had offered evidence of his attendance at the Living Stone Assembly but he found that this evidence was insufficient to overcome his adverse findings concerning the applicant’s credibility generally.

[16] Based on these findings, the member dismissed the claim for protection. The member also found the claim to be manifestly unfounded.

IV. STANDARD OF REVIEW

[17] It is well established that this Court reviews the RPD’s assessment of the evidence before it on a reasonableness standard (*Hou v Canada (Citizenship and Immigration)*, 2012 FC 993 at paras 6-15 [*Hou*]). This standard applies to the RPD’s factual findings, including its credibility determinations (*Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242 at para 17), findings concerning the genuineness of documents, and its interpretation of documentary evidence (*Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 21). It also

applies to the RPD's determination that a claim is manifestly unfounded (*Yuan v Canada (Citizenship and Immigration)*, 2018 FC 755 at para 13).

[18] It is also well established that this Court should show significant deference to the RPD's credibility findings (*Su v Canada (Citizenship and Immigration)*, 2013 FC 518 at para 7 [*Su*]). This is because the RPD is well-placed to assess credibility (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (FCA) at para 4 (QL); *Hou* at para 7). It has the advantage of observing the witnesses who testify and may have expertise in the subject matter that the reviewing court does not share, including with respect to country conditions (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42 [*Rahal*]; *Zhou v Canada (Citizenship and Immigration)*, 2015 FC 821 at para 58). Nevertheless, the reviewing court must ensure that the RPD's credibility findings are reasonable.

[19] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should

intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

V. ISSUE

[20] The sole issue raised by the applicant is whether the RPD's determination that his claim for protection is clearly fraudulent and, therefore, manifestly unfounded is unreasonable.

VI. ANALYSIS

[21] Section 107.1 of the *IRPA* provides that, if the RPD rejects a claim for refugee protection, "it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent." A claim may be found to be clearly fraudulent when "the decision maker has the firm conviction that refugee protection is sought through fraudulent means, such as falsehoods or dishonest conduct that go to the determination of whether or not refugee protection will be granted" (*Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596 at para 31 [*Warsame*]). It requires more than simply the rejection of the claim. The decision maker must find that the claimant has deliberately portrayed matters that go to the core of the claim for protection falsely (*Warsame* at para 36). While such a finding bars access to the Refugee Appeal Division (see section 110(2)(c) of the *IRPA*), the applicant is barred from access to this in any event because his claim pre-dates its establishment (see sections 36(1) and 37 of the *Balanced Refugee Reform Act*, SC 2010, c 8, as amended by the *Protecting Canada's Immigration System Act*, SC 2012, c 17).

[22] The onus rests on a refugee claimant to establish the essential elements of his or her claim for protection. The RPD “may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances” (*IRPA*, s 170(h)). A claimant is not required to provide corroborative evidence unless there are valid reasons to question the claimant’s truthfulness. This is because, when a refugee claimant swears that certain allegations are true, the allegations are to be taken as true unless there is reason to doubt that this is so (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at para 5 (CA)[*Maldonado*]). This presumption of truthfulness can be rebutted by evidence that is inconsistent with the claimant’s allegations. It can also be rebutted when there are grounds to find that the claimant’s testimony lacks credibility (*Ismaili v Canada (Citizenship and Immigration)*, 2014 FC 84 at para 36; *Guyen v Canada (Citizenship and Immigration)*, 2018 FC 38 at paras 35-38).

[23] A finding that a claimant lacks credibility may be based on the manner in which the claimant testified at the hearing, although such determinations must always be made with care and sensitivity to the specific circumstances of the claimant (cf. *Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 102-04; *R v N.S.*, 2012 SCC 72 at paras 21-27). It may also be based on the failure of the claimant’s account to stand up to scrutiny, whether intrinsically or against extrinsic evidence such as country conditions. The implausibility of a claimant’s account, or unexplained inconsistencies, omissions, or contradictions, can lead to adverse credibility findings and the rejection of the claim. Still, such 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,

citing *Lubana v Canada (Citizenship and Immigration)*, 2003 FCT 116 at paras 10-11; *Rahal* at para 43).

[24] Credible or trustworthy corroborative evidence can bolster one's confidence in a claimant's truthfulness (even though this may be unnecessary given the *Maldonado* presumption) or it can restore one's confidence in the claimant's truthfulness when this has been cast into doubt. There is no general requirement for corroboration and a panel errs if it makes an adverse credibility finding on the basis of the absence of corroborative evidence alone (*Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at para 6). However, if there are valid reasons to question a claimant's truthfulness, the panel may also consider the claimant's failure to provide corroborative evidence, but only where the claimant could not give a reasonable explanation for the absence of such evidence (*Dundar v Canada (Citizenship and Immigration)*, 2007 FC 1026 at para 22, citing *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 para 10).

[25] On the other hand, if a claimant does offer evidence to corroborate his or her claim, concerns about the credibility or trustworthiness of that evidence can, in turn, raise further questions about the claimant's truthfulness. Even so, the evidence must be examined independently of concerns about the claimant's credibility before it is rejected (*Yu v Canada (Citizenship and Immigration)*, 2015 FC 1138 at paras 31-37; *Lu v Canada (Citizenship and Immigration)*, 2016 FC 846 at paras 33-35). Otherwise, the decision maker risks reasoning in a way that begs the very question at issue: the corroborative evidence is not believed simply

because the claimant is not believed (*Sterling v Canada (Citizenship and Immigration)*, 2016 FC 329 at para 12).

[26] The member's central finding in the present case was that the applicant had failed to establish that he was a genuine Christian. The applicant obviously maintained that he was but the member did not believe him. In a number of respects, the member's assessment of the evidence meets the test of reasonableness. However, as I will explain, it suffers from a fatal flaw.

[27] The member's rejection of the applicant's evidence about his Christian identity rested in part on material differences between the applicant's accounts of what had happened in China. The only one of these that the applicant takes issue with on this application for judicial review is the role of Mr. Xi in the escape from the PSB. In my view, counsel for the applicant attempts to parse the applicant's testimony before the RPD too finely to explain why he did not mention Mr. Xi earlier. In any event, it was open to the member to consider the omission of Mr. Xi in the first PIF and his inclusion in the second when assessing the applicant's claim that the police raided a church service he was participating in on April 18, 2010, a pivotal event in his narrative.

[28] The member's rejection of the applicant's claim also rested in part on the applicant's failure to produce corroborative documents relating to his religious practices in China. Given the differences between the applicant's accounts of material events, it was reasonable for the member to ask the applicant why he had not produced any evidence to corroborate his claim that he had been a practicing Christian in China, the central element of his claim for protection (*Yu v*

Canada (Citizenship and Immigration), 2010 FC 310 at para 28; *He v Canada (Citizenship and Immigration)*, 2010 FC 525 at para 14; *He v Canada (Citizenship and Immigration)*, 2013 FC 362 at para 22). The applicant attempted to explain why he had not provided any such evidence – his religious practices had been secret at the time – but the member did not find this a reasonable explanation in the circumstances. In my view, this conclusion was open to the member. Crucially, the member did not draw an adverse inference from the absence of corroborative evidence alone.

[29] The applicant also relied on evidence of continuing Christian practices in Canada to support his claim to have been a Christian in China and to support his *sur place* claim. Standing on its own, the RPD's assessment of this evidence is intelligible and justifiable. It was open to the RPD to find that the letters from Reverend Ko and the other evidence were insufficient to establish the genuineness of the applicant's claim to be a practicing Christian, particularly in light of the member's concerns about the applicant's credibility concerning the events in China (see, for example, *Li v Canada (Citizenship and Immigration)*, 2012 FC 998 at paras 29 and 32, and *Su* at para 17).

[30] Given the foregoing, the applicant's claim for protection required some other form of corroboration if it was to have any chance of success. The PSB documents could serve such a purpose, which is why they were an important element of the claim. In my view, however, the member's findings concerning these documents are unreasonable.

[31] Unlike many cases involving such evidence that come before this Court, the member's findings were not based on discrepancies between the documents tendered and recognized exemplars of the types of document in question. Rather, the member concluded that the documents were fraudulent because he found that the law of criminal procedure in China does not expressly provide for the use of such documents. The member reasoned that since the Wanted Circular "does not comply with" and "is not in keeping with" the law of Chinese criminal procedure, it must be fraudulent. Similarly, since the member could not find any reference to Release Certificates in the law of Chinese criminal procedure, and since the statutory provision referred to in the Release Certificates tendered by the applicant did not appear to have anything to do with the power to release someone upon the completion of a criminal sentence, these documents must be fraudulent as well.

[32] In my view, a stronger evidentiary foundation is required to support a reasonable conclusion that these documents are fraudulent. The evidence before the member did not foreclose the possibility that such documents could be used. In the absence of evidence that the PSB does not use such documents, whether as a matter of practice or because the law does not permit it, the member's finding that the documents are fraudulent is unreasonable. The determination that the claim is manifestly unfounded is, therefore, also unreasonable.

[33] The applicant submits that this error with respect to the Wanted Circular is determinative of the application for judicial review because, if the document is authentic, it corroborates an essential element of his claim. It does not follow from the fact that the member erred in finding that the document is fraudulent that the member therefore also erred in not accepting it as

genuine. Nevertheless, we are left with a potentially significant document whose probative value and weight have not been assessed properly by the RPD. This is also the case with respect to the Release Certificates.

[34] As discussed above, a reasonable decision maker could find that the applicant's claim for protection suffers from a number of weaknesses. Other things being equal, the member's rejection of the applicant's claim could well have withstood review. Indeed, there may even be a reasonable basis to find that, properly considered, the PSB documents are insufficient to overcome the frailties in the applicant's account. This, however, is not for me to determine in the absence of findings by the RPD concerning those documents that are not tainted by reviewable errors. Given the centrality of the PSB documents to the applicant's claim, I am unable to find that the decision overall is reasonable (cf. *Ma v Canada (Citizenship and Immigration)*, 2018 FC 163 at para 19, and *Nagornyak v Canada (Citizenship and Immigration)*, 2017 FC 215 at para 33). The applicant is entitled to a proper assessment of the significance of these documents by the RPD. There must, therefore, be a new hearing.

VII. CONCLUSION

[35] The application for judicial review is allowed. The decision of the RPD dated December 5, 2017, is set aside and the matter is remitted for reconsideration by a differently constituted panel.

[36] The parties did not suggest any questions of general importance for certification. I agree that none arise.

JUDGMENT IN IMM-5488-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated December 5, 2017, is set aside and the matter is remitted for reconsideration by a differently constituted panel.
3. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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