Federal Court  Cour fédérale

Date: 20190830

Docket: IMM-555-19

Citation: 2019 FC 1123

Ottawa, Ontario, August 29, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CUIXIA HUANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated January 4, 2019 [the Decision]. The Decision held that the Applicant is not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is allowed, because I have found that the RPD breached principles of procedural fairness by making credibility findings related to the Applicant's testimony at an earlier RPD hearing, without affording her an opportunity to address those specific credibility concerns at the hearing before the RPD giving rise to its Decision.

II. **Background**

[3] The Applicant, Cuixia Huang, is a 32-year-old Chinese citizen. She alleges that she began practicing Falun Gong in 2006 while still in China. She says that her grandmother introduced her to the practice, suggesting it as a way of relieving Ms. Huang's serious menstrual pains. She states that the practice relieved her pain, as a result of which she joined her grandmother's secret Falun Gong practice group, prior to the grandmother's death in a car accident in 2008.

[4] Ms. Huang came to Canada on May 30, 2009, under a student visa, to study in a program at George Brown College starting in August 2009. However, before the semester began, she decided to study at Seneca College instead. She says that she continued to practice Falun Gong during this time.

[5] Ms. Huang alleges that her parents told her the Chinese Public Security Bureau [PSB] came looking for her in October 2009, because the PSB knew about her Falun Gong practice in China and in Canada. The PSB purportedly instructed her parents to tell Ms. Huang to return to China and turn herself in. She then claimed refugee protection in Canada. She says that the PSB

returned to her home in China on three additional occasions in February 2010, October 2010, and June 2011.

[6] Ms. Huang alleges that around February 2010 the bank informed her parents that their account had been frozen. The resulting financial strain, she says, caused her to drop out of Seneca College.

[7] The RPD rejected Ms. Huang's claim on December 2, 2011. On August 20, 2012, Justice Mandamin of this Court found that the RPD was unreasonable in conducting an overly microscopic investigation of Ms. Huang's Falun Gong knowledge and in concluding that she is not a genuine practitioner in Canada. Justice Mandamin also found problematic the RPD's conclusion that Ms. Huang acquired her Falun Gong knowledge to advance a fraudulent refugee claim. The Court remitted Ms. Huang's claim back to the RPD for redetermination.

[8] Ms. Huang alleges that the PSB returned to her parents' home a fourth time, in October 2012. In June 2013, the bank advised her parents by telephone that their account was no longer frozen.

[9] Ms. Huang was seriously injured in a car accident in July 2014. During her lengthy recovery, she received physical and psychological treatment. She says her Falun Gong practice helped her through this trying time. She practiced with several fellow Falun Gong adherents in Canada.

[10] Ms. Huang's *de novo* hearing before the RPD took place on July 23, 2018.

III. **Decision under Review**

[11] The RPD denied Ms. Huang's refugee claim a second time in the Decision dated January 4, 2019, which is the subject of this application for judicial review. The Decision turned largely on adverse credibility determinations related to Ms. Huang's reasons for coming to Canada, her Falun Gong practice in China, the PSB's treatment of her parents, and the PSB's pursuit of her and her fellow practitioners in China.

[12] The RPD found that Ms. Huang had not provided sufficient credible and trustworthy evidence that she came to Canada to be a genuine student. In particular, it took issue with her arrival in May 2009, several months prior to her intended college start date, her transfer from George Brown College to Seneca College, and her failure to present evidence of class attendance.

[13] Ms. Huang explained that that she did not know the reason for the timing of her arrival because her parents bought her ticket. The RPD found implausible that she did not discuss the timing with her parents.

[14] Ms. Huang further explained that she transferred from George Brown College to Seneca College after concluding that Seneca was academically superior. Ms. Huang had visited both schools only once before deciding to switch. The RPD found implausible that she could make

this decision in such a short time. The RPD also concluded that academic superiority was an unlikely motivator, as she had enrolled only in English as a second language program at Seneca.

[15] The RPD further noted a lack of evidence demonstrating her class attendance and tuition payments during this period. It concluded that Ms. Huang was not a genuine student in Canada and never intended to be one when she came here.

[16] The RPD was also concerned with the lack of documentary evidence related to Ms. Huang's Falun Gong practice in China, finding that she had not submitted sufficient credible and trustworthy evidence that she was a practitioner in China. It noted that she submitted no evidence of the following: the medical condition that caused her to start practicing Falun Gong; her grandmother who introduced her to the practice; the discovery of her Falun Gong practice by the Chinese authorities; the situation of her fellow practitioners in China; the repercussions suffered by her family; or efforts by the PSB to pursue her.

[17] The RPD noted a lack of evidence relating to Ms. Huang's grandmother and her death. Ms. Huang claimed that her family obtained a death certificate, but the PSB kept it when her father sought to have the grandmother's hukou adjusted. The RPD noted that, in the previous RPD hearing, Ms. Huang testified that her parents would be too scared to approach the PSB to have the death certificate returned, and that the PSB always keep death certificates when people die. The RPD observed that Ms. Huang had given no explanation for why her parents would consider such a request to implicate them in her Falun Gong practice, or any evidence as to how she knew about this practice by the PSB. The RPD found it lacking in credibility that the

Chinese government would operate in this way and that additional copies of death certificates were not available.

[18] The RPD also concluded that the absence of medical records from China relating to Ms. Huang's menstrual pain was not credibly explained. It did not accept her explanations that her parents could not find her medical booklet and were too scared of the PSB to ask the hospital for a replacement. The RPD also considered Ms. Huang's testimony at her first RPD hearing that she did not feel it was safe to request her Chinese medical records from Canada, but it found this explanation unreasonable, finding she would be at no additional risk from the PSB who already knew she was in Canada. The RPD drew a negative inference as to Ms. Huang's credibility as a result.

[19] As to repercussions for Ms. Huang's parents, the RPD acknowledged the documentary evidence that the PSB frequently mistreats the families of escaped Falun Gong practitioners. However, it concluded, based on Ms. Huang's testimony at her first RPD hearing, that the lack of serious PSB mistreatment of members of Ms. Huang's family further undermined the allegations that the PSB was pursuing her. The RPD noted that, although the freezing of the bank account to which Ms. Huang testified at her first hearing would be a repercussion, she failed to mention this in her Personal Information Form. The RPD also observed that, in the first hearing, Ms. Huang initially testified that there were no repercussions for her parents and only later in that hearing testified as to the freezing of the account when explaining why she subsequently left Seneca College. The RPD characterized Ms. Huang's testimony at the first hearing as contradictory and evolving.

[20] With respect to her pursuit by the PSB, the RPD noted the lack of evidence that Ms. Huang is wanted or that her Falun Gong practice had been discovered. In particular, it noted that she said she was afraid to contact other practitioners in her group in China for fear of communications monitoring.

[21] In conclusion with respect to credibility, the RPD found that Ms. Huang had failed to provide persuasive documentary evidence to support her allegations, or a reasonable explanation for the absence of evidence. It drew a negative inference based on its finding that she did not come to Canada as a genuine student and, based on the cumulative negative findings, concluded that Ms. Huang had not met her onus of establishing that she was a Falun Gong practitioner in China and is being pursued by the PSB on that account.

[22] Finally, on the issue of Ms. Huang's Falun Gong practice in Canada, the RPD accepted that she practiced in Canada and has substantial knowledge of Falun Gong. It observed that she submitted long letters from local co-practitioners, but the RPD gave them little weight, because the other practitioners could not speak to her motivations. The RPD concluded that Ms. Huang was not a genuine Falun Gong practitioner in China and, in the absence of any evidence of conversion-type experience in Canada, that she has studied Falun Gong and engaged in Falun Gong activities in Canada for the purposes of advancing her refugee claim and not because she is a genuine practitioner. It found that she would not likely practice Falun Gong in China and would therefore not be persecuted on that account, noting also that there was no persuasive evidence that the Chinese authorities are aware of Ms. Huang's Falun Gong activities in Canada.

[23] The RPD therefore rejected Ms. Huang's claims under both s 96 and 97 of IRPA.

IV. **Issues and Standard of Review**

[24] The Applicant submits three issues for the Court's consideration:

A. Did the RPD commit a breach of natural justice by making adverse credibility findings about matters that were not put to the Applicant at her *de novo* hearing?

B. In the alternative, did the RPD err by finding that the Applicant is not a genuine Falun Gong practitioner in Canada?

C. Did the RPD make unreasonable credibility findings?

[25] The first issue, raising an alleged breach of natural justice or procedural fairness, is reviewable on the standard of correctness, while the remaining issues attract the reasonableness standard.

V. **Analysis**

[26] My decision to allow this application for judicial review turns on the first issue raised by the Applicant, alleging a breach of natural justice or procedural fairness. The Applicant's arguments relate to the following components of the RPD's analysis, in which it made adverse findings based on the transcript of the hearing that resulted in the December 2, 2011 RPD decision:

A. The RPD questioned the Applicant's testimony at the previous hearing, that her parents would be too scared to approach the PSB to have her grandmother's death certificate returned, because she did not give any reason why such a request would implicate her parents in her Falun Gong practice;

B. The RPD found the Applicant's testimony at the previous hearing, that the PSB always keep death certificates when people die, not to be credible, as she provided no evidence as to how she knew of this practice;

C. The RPD drew a negative inference as to the Applicant's credibility, finding to be unreasonable her testimony at the first hearing that she failed to request that her medical records be sent to her because she did not consider it safe to do so;

D. The RPD found the Applicant's allegations to be undermined by her testimony at the previous hearing as to the lack of mistreatment that her family members experienced from the PSB; and

E. The RPD found the Applicant's testimony at the first hearing to be contradictory and evolving in relation to the freezing of her parents' bank account by the PSB.

[27] The Applicant submits that, while the RPD is entitled to use the transcripts from her previous hearing in the *de novo* proceeding before the RPD, including using such transcripts to make adverse credibility findings, the principles of procedural fairness required the RPD to

afford her an opportunity to be heard and make representations on the points in issue before such findings were made. She relies on authorities including *Darabos v Canada (Citizenship and Immigration)*, 2008 FC 484 at paras 17-18, and *Khalof v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 444 at para 15 [*Khalof*].

[28] The Applicant relies on these cases as authority for two related requirements arising from principles of procedural fairness: (a) a refugee claimant has the right to know the case to be met in a proceeding before the RPD; and (b) the process must afford an opportunity for the RPD to observe the demeanour of the claimant while testifying before finding the testimony to be lacking in credibility or trustworthiness. At the hearing of this application, the Applicant's counsel focused in particular on the latter requirement, described by Justice Gibson in *Khalof*:

> 15 I am satisfied that the decision of the CRDD to rely upon the transcript from the first hearing of the principal applicant's testimony constituted that transcript "evidence adduced in the proceedings", within the meaning of subsection 68(3). Nowhere in the transcript of the second hearing or in the reasons of the CRDD for the decision here under review is the principal applicant's testimony, as reflected in the transcript relied upon, questioned as to its credibility or trustworthiness. If it had been, I am satisfied that the CRDD could not have relied on subsections 68(2) or (3) to justify reliance on the transcript. <u>To rely on a mere transcript as a basis for a finding of want of credibility or trustworthiness would, I am satisfied, constitute a breach of natural justice and fairness. Principles of natural justice and fairness would require that the CRDD hear testimony and have the opportunity to observe the demeanour of the person testifying before a finding of want of credibility and trustworthiness of testimony could be fairly made.</u> But no such finding was made here. [Emphasis added]

[29] At the hearing of this application, the Respondent's counsel noted that he had interpreted the Applicant's Memorandum of Law and Argument as relying upon the first of the two

principles described above, rather than the second. Indeed, I noted at the hearing that I had interpreted the Applicant's written materials in same manner. However, while raising the possibility of prejudice to the Respondent in being able to respond to the Applicant's arguments, the Respondent's counsel advised that he nevertheless was in a position to respond, and he proceeded to do so. Moreover, while the written Memorandum could have been clearer, I accept the submission of the Applicant's counsel that the written materials' reliance on *Khalof*, an authority addressed by both parties, gives sufficient notice of this issue.

[30] The Respondent submits that *Khalof* is distinguishable, as the applicant in that case did not testify before the second panel of the CRDD. The Respondent argues that, in the present case, as the Applicant testified in the *de novo* hearing, it cannot be said that the RPD made credibility findings without first having heard the Applicant. I do not find this argument to assist the Respondent. In my view, the reasoning underlying the principle expressed in *Khalof* involves affording the decision-maker an opportunity to observe the demeanour of the refugee claimant while providing testimony that pertains to the specific adverse credibility determinations.

[31] The Respondent also submits that the statement in *Khalof* upon which the Applicant relies is *obiter* and has not been followed. Subsequent cases, it notes, hold that a second panel can rely on the transcript from a first hearing. By way of example, the Respondent cites *Quazi v Canada (Citizenship and Immigration)*, 2001 FCT 1098 [*Quazi*] at para 5, in which Justice Pinard stated:

> 5 … The RD may of course consider documents in relation to a previous hearing of the applicant's claim, such as the transcripts pertaining thereto (see, for example, *Khalof v. Minister of Citizenship and Immigration*, 185 F.T.R. 282 …

[32] While I accept that *Khalof* did not turn on the statement upon which the Applicant relies, I do not regard *Quazi* as disagreeing with that statement. The mischief is not the RPD's reliance upon testimony from the first hearing, even for purposes of adverse credibility determinations. As noted, the Applicant accepts this use is permissible. The unfairness arises when the RPD does not afford the Applicant an opportunity to address specific credibility concerns, in front of the current decision-maker, before it draws adverse credibility determinations. I regard this principle as related to the Applicant's right to know the case to be met and to have an opportunity to address that case.

[33] The Respondent relies on *Danquah v Canada (Secretary of State)*, [1994] FCJ No 1704 at para 6 [*Danquah*], for the principle that tribunals should not have to warn applicants about which part of the record will play a material role in their decisions. However, in my view, the explanation of this principle by Justice MacKay in *Danquah* draws an important distinction between, on the one hand, unconvincing evidence and, on the other, inconsistencies that could give rise to adverse credibility determinations and which engage procedural fairness requirements:

> 6 Nor am I persuaded that the tribunal was unfair in its process in not alerting the applicant at the time of her hearing, of its concerns about weakness of detail in her testimony about these matters. There was no instance of inconsistency in the applicant's evidence relied upon by the tribunal, which it ought in fairness to have brought to the attention of the claimant. A hearing tribunal has no obligation to point to aspects of the applicant's evidence that it finds unconvincing where the onus is on the applicant to establish a well-founded fear of persecution for reasons related to Convention refugee grounds. [Emphasis added]

[34] Finally, I note the Respondent's reliance on *Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at paras 11 and 13. In *Adeoye*, Justice Favel found no procedural fairness issue when the Refugee Appeal Division used the evidentiary record before the RPD as an additional basis to question the applicant's credibility, where the applicant's credibility was already in question before the RPD. I agree with the Applicant's position that the analysis in *Adeoye*, involving the role of an appellate tribunal, is not applicable to the present circumstances where the first instance tribunal was required to consider Ms. Huang's claim *de novo*. The RPD had an obligation to provide notice of concerns related to her credibility, so that she could make informed representations.

[35] As a result, this matter must be returned to the RPD for redetermination. Having reached my decision based on the procedural fairness concerns canvassed above, it is not necessary to address the Applicant's arguments related to the reasonableness of the Decision.

[36] Neither of the parties has proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-555-19

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, and the matter is returned to a differently constituted panel of the Refugee Protection Division for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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