

Federal Court



Cour fédérale

Date: 20200424

Docket: IMM-6060-18

Citation: 2020 FC 554

Ottawa, Ontario, April 24, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JIANQIANG LI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] dated November 1, 2018 in which it dismissed the Applicant's appeal and found that the Applicant was not a Convention refugee or a person in need of protection [Decision].

[2] For the reasons that follow, this application is dismissed.

II. **Background Facts**

[3] The Applicant, Jianqiang Li, is a citizen of China and no other country. Prior to coming to Canada, the Applicant lived in China with his wife and son.

[4] The Applicant paid a smuggler to help him obtain a Canadian visitor visa based on false information. The Applicant entered Canada on December 26, 2014 using a genuine Chinese passport and the falsified Canadian visitor visa.

A. *Interview at Vancouver International Airport*

[5] The Applicant was detained and interviewed by the Canadian Border Services Agency [CBSA] at Vancouver International Airport. The Applicant told the interviewing officer that he came to Canada to visit casinos and sightsee with a tour group, and that he planned to stay in Canada for 3 to 5 days.

[6] When the interviewing officer told the Applicant that she did not believe his story, the Applicant stated that he was a Christian and that he feared persecution by the Chinese government. The officer asked the Applicant about his Christian beliefs.

[7] The officer then asked the Applicant why he was “really here” in Canada. The Applicant stated that he wanted to work in Canada to provide money to his family in China, and admitted that he did not actually have any problems or face persecution in China.

[8] The Applicant was detained in Vancouver and released after a detention review hearing on January 8, 2015. The Applicant then moved to Toronto.

B. *First Basis of Claim Form*

[9] The Applicant made a refugee claim on January 17, 2015. In his Basis of Claim [BOC] narrative, the Applicant stated that he and his wife wanted to have more children, but feared the risk of abortion, sterilization, or detention for violating the family planning policies in China. The Applicant stated that if he returned to China, he would lose the human right to freely have more children.

[10] The Applicant stated that he planned to enter Canada or the United States and bring his wife and son over afterwards. The Applicant stated that his friends told him he needed to hire a smuggler to help him obtain a visitor visa, because he would never be granted one on his own.

[11] The Applicant stated that the smuggler told him to tell Canadian authorities that he was a Christian who had suffered religious persecution in China. The Applicant also said that he was frightened during his interview with the CBSA officer, and was just following the smuggler's instructions when he told the officer he was a Christian.

C. *Supplemental Basis of Claim Form*

[12] The Applicant filed a supplemental BOC form on July 6, 2017. In his narrative, the Applicant stated that while China has changed from a One Child Policy to a Two Child Policy,

he and his wife believe it is their human right to have as many children as they decide. The Applicant also stated that he feared being punished by Chinese authorities for hiring a smuggler.

[13] The Applicant added a *sur place* claim. He stated that he had become a Falun Gong practitioner since coming to Canada. The Applicant was given a pamphlet from a Falun Gong practitioner in March 2015, and then began reading books on Falun Gong and practicing with a group at Pacific Mall.

[14] The Applicant stated that he attended Falun Gong events in Ottawa, Toronto, and Hamilton, and that he practices Falun Gong at home every day, and with a group every Saturday. The Applicant also stated that he attended a Falun Gong candlelight vigil in front of the Chinese Consulate in Toronto in April 2017.

[15] The Applicant says that he wants to practice Falun Gong openly, but could not do so in China because of the ban and ongoing persecution.

III. Decision of the Refugee Protection Division

[16] The Refugee Protection Division [RPD] in an oral decision given at the end of the hearing, found that the Applicant did not establish that there was a serious possibility of persecution on a Convention ground or that, on a balance of probabilities, that he would be personally subjected to a danger of torture or face a risk to life or a risk of cruel and unusual treatment or punishment upon return to China.

[17] The RPD found that the determinative issue was credibility. The RPD found that the Applicant was generally without credibility in regard to the basis of his claim.

[18] The RPD drew an adverse inference from the fact that the Applicant made a false claim for refugee protection on the basis of Christianity at the port of entry, when the Applicant really intended to work in Canada. The RPD found that while the Applicant said the smuggler told him to say he was a Christian, the Applicant demonstrated a surprising amount of Christian knowledge at the port of entry, which indicated that the Applicant had prepared, and that he intended to seek entry as a religious refugee if challenged.

[19] The RPD drew a negative inference from the Applicant's failure to make refugee claims in Germany or France, and found that there was no basis to establish that the Applicant had a credible fear of persecution based on China's family planning policy or based on his hiring a smuggler.

[20] The RPD found that the Applicant's lack of general credibility, along with his demeanour while testifying, negatively affected his *sur place* claim. The RPD concluded that the Applicant joined Falun Gong with the express intention of creating a *sur place* claim, and that he did not actually believe the tenets of Falun Gong.

IV. **Decision under Review**

[21] The RAD stated that it would apply *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] which meant that it would use the standard of correctness to review

the RPD's decision, except for issues involving the credibility of oral testimony. The RAD stated that, where the RPD enjoys a meaningful advantage, it would apply a modified standard of reasonableness for findings on the credibility of oral testimony.

[22] The RAD confirmed the RPD's decision and found that the Applicant was neither a Convention refugee nor a person in need of protection.

[23] The RAD reviewed the transcript of the interview with the CBSA officer and found that the Applicant was not truthful in his original statements about his fear of persecution based on his Christian faith. The RAD found that the Applicant only changed his testimony after being questioned at length about his Christian beliefs.

[24] The RAD found that the Applicant had "made a mockery of Canada's laws for immigration in regards to refugees seeking protection" and that the Applicant's claim that he feared persecution from family planning authorities was not credible.

[25] The RAD noted that Federal Court jurisprudence cautions against determining religious identity on the basis of a refugee claimant's religious knowledge, or lack thereof. However, the RAD found that the objective evidence establishes that knowledge is an important component of Falun Gong. The RAD found that the expectations on a refugee claimant who claims to adhere to a knowledge-based practice may well be different from the expectations on a claimant who claims to adhere to a faith-based practice. The RAD concluded that there was an expectation that

a refugee claimant who was a Falun Gong practitioner would be able to testify accurately to that essential fundamental knowledge.

[26] The RAD gave deference to the RPD's findings that the Applicant demonstrated a lack of sincerity and a negative demeanour while testifying about his Falun Gong practice. The RAD then reviewed the responses that the Applicant gave the RPD about Falun Gong. Based on the length of time that the Applicant has practiced and studied Falun Gong, the RAD concluded that it was reasonable to expect a much more complete knowledge about some of the basic concepts,. The RAD found on a balance of probabilities that the Applicant was not a genuine practitioner of Falun Gong.

[27] The RAD reviewed documentation in the National Documentation Package about the treatment of family members and monitoring of Falun Gong practitioners by China. The RAD found that there was no evidence to show that the Chinese authorities had become aware of the Applicant's Falun Gong activities in Canada, or that his family had been approached by the authorities in China because of his alleged practice of Falun Gong.

[28] The RAD concluded that the Applicant was not a genuine Falun Gong practitioner; he could therefore return to China without fear of persecution.

V. Issues and Standard of Review

[29] The Applicant raises three issues: (1) was there a reasonable apprehension of bias on the part of the RAD; (2) was there an overzealous assessment by the RAD of the Applicant's

knowledge of Falun Gong; (3) did the RAD err in law by finding that the Applicant's Falun Gong practice and activities in Canada over 2.5 years were not genuine?

[30] The latter two issues have overlapping facts and arguments. They come down to whether the RAD committed a reviewable error when it assessed the Applicant's Falun Gong identity to determine whether it could ground his *sur place* claim.

[31] The standard of review for an allegation that the RAD displayed a reasonable apprehension of bias has been correctness: *You v Canada (Citizenship and Immigration)*, 2016 FC 1010 at paragraph 12.

[32] Recently the Federal Court of Appeal has reviewed the standard of correctness. Mr. Justice Rennie clarified that whether the duty of procedural fairness has been met does not require a standard of review analysis. The ultimate question to be answered by the Court is whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56.

[33] The other two issues speak to whether the Decision is reasonable. *Huruglica* established that the standard of review to be applied by this Court to a decision of the RAD is reasonableness: *Huruglica* at paragraph 35.

[34] This application was argued before the Supreme Court of Canada released the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] in which it restated how a reviewing court is to conduct a reasonableness review.

[35] *Vavilov* has done away with the former requirement that, in instances where the standard of review had not already been satisfactorily determined, an analysis of the appropriate standard is to be conducted by the Court. Instead, there is now a clear statement that when the merits of an administrative decision are judicially reviewed, the applicable standard of review is presumed to be reasonableness: *Vavilov* at paragraph 23.

[36] The presumption does not apply to an issue involving a breach of natural justice or the duty of procedural fairness which a reasonable apprehension of bias engages: *Vavilov* at paragraph 23. I note that *Vavilov* did not alter the existing approach to determining whether an applicant's procedural fairness rights have been met.

[37] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[38] This application was argued on the basis that the standard of review is reasonableness other than for the allegation of bias. Although the principles set out in *Vavilov* now apply to this application, I find that it is not necessary to receive further submissions from the parties as the

result would be the same under the pre-*Vavilov* framework established in *Dunsmuir* and its progeny.

VI. **Does the Decision show a Reasonable Apprehension of Bias by the RAD?**

[39] The test for determining whether there is actual bias or a reasonable apprehension of bias by a decision-maker has been established by the Supreme Court of Canada in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at pages 394 and 395:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude.

. . . The grounds for this apprehension must, however, be substantial . . . [and not] related to the “very sensitive or scrupulous conscience”.

[40] The Applicant submits that when the RAD stated that he had “made a mockery of Canada’s laws for immigration in regards to refugees seeking protection” it created a reasonable apprehension of bias because it was “a prejudicial and unsubstantiated finding.”

[41] I disagree.

[42] The RAD came to that conclusion only after reviewing the transcript of the interview of the Applicant by the CBSA at the Vancouver International Airport. The interview began with the Applicant telling a number of lies concerning the purpose of his visit to Canada, and the business his family had, money he had received from his family, and that he was a Christian. When

pressed, the Applicant said everything was a lie except that he is a Christian and that he wanted to stay in Canada permanently.

[43] On being asked what kind of persecution he would face in China, the Applicant's first answer was "I don't like my living standards, I only have a small place to live. The police always say I'm psycho". When the question was repeated, the Applicant said he was worried he would be arrested because "they always talk about me." When asked a third time whether he would face persecution in China, the answer became "no, not really." These three questions were asked and answered virtually back to back in the interview.

[44] When the CBSA asked the Applicant why he did not tell the truth, he said "I thought I will get lucky and get through."

[45] The RAD concluded the Applicant was attempting to stay in Canada using a false story and that he had not been credible or truthful in the CBSA interview. I find that a reasonable interpretation of that answer is that the Applicant was willing to say anything to try to gain refugee protection.

[46] The RAD also noted the changes to the Applicant's BOC and the Applicant's claim that the issues other than family-planning and Falun Gong as a basis for his *sur place* claim were all peripheral. That was the Applicant's suggestion in his submissions to the RAD.

[47] In the first BOC, the Applicant's fear was both punishment for using a smuggler to leave China and family planning in China that would frustrate his ability and desire to have more children than the policy allowed. In the second BOC, he indicated that he been told by the smuggler to say he was a Christian. He apologized for not being truthful when he entered Canada. He also reiterated his desire to have as many children as he and his wife would decide even though there was a Two Child Policy in China by then.

[48] The main thrust of the second BOC was to set out the details of his Falun Gong *sur place* claim.

[49] Although the Applicant alleges that the RAD made an unsubstantiated finding that he had "made a mockery of Canada's laws for immigration" the record does not bear that out. When a person seeking refugee protection repeatedly lies and changes their story, including the nature of the persecution they fear, if any, on returning to their home country I have no hesitation in finding that a statement to the effect that the person was making a mockery of the law is fair comment.

[50] I also disagree with the Applicant's characterization of the RAD's observation as being a finding. Given the many untruths told to officials by Mr. Li, it appears to be a reasonable, albeit pointed, comment.

[51] For the foregoing reasons I conclude that the impugned statement made by the RAD would not be taken by an informed person, viewing the matter realistically and practically, as evidence of bias, either actual or apprehended, held by the RAD against the Applicant.

VII. **Did the RAD err in its assessment of the Applicant's knowledge of Falun Gong?**

[52] In the Applicant's submissions to the RAD he raised one issue: did the RPD commit a reviewable error in its assessment of his Falun Gong identity at the time of the hearing?

A. *Did the RAD overzealously assess the Applicant's knowledge of Falun Gong?*

[53] The Applicant says the RAD failed to take into account that he has only six years of education. He says the RAD was overzealous and 'nitpicking' in considering his knowledge of Falun Gong. In addition, he submits that the RAD made different findings than the RPD without explaining why the RPD was wrong.

[54] The RAD did not disagree with the RPD about the Applicant's practice of Falun Gong. They each concluded that he was not a genuine practitioner.

[55] The RAD noted that the Applicant stated that he practiced the 5 sets of Falun Gong exercises every day for over 2 years and read Zhuan Falun 3 times. He also practiced with a Falun Gong group at Hamilton City Hall every Saturday afternoon.

[56] The RPD found that the Applicant's answers about his practice of Falun Gong were vague and insufficient in light of a long practice over a period of 2 or 2.5 years. It also found that

his difficulty in answering questions about the importance of Falun Gong practice on his personal spiritual self detracted from his credibility.

[57] Essentially, the RPD accepted that the Applicant had some knowledge and he had attended religious festivities. The RAD specifically noted that the RPD said that those activities were not the focus of assessing whether he was a genuine Falun Gong practitioner.

[58] The RAD reviewed the transcript of the Applicant's interview with the CBSA after which it found he was not credible or truthful in that interview. That is consistent with the RPD finding.

[59] The RAD acknowledged that the RPD found there was credible evidence that the Applicant practised Falun Gong in Canada since March 2015 but that the purpose of his practice was to establish a *sur place* claim.

[60] Because the Applicant specifically attacked the RPD decision on the basis that it engaged in a highly subjective, speculative and overzealous attack on his Falun Gong identity, the RAD assessed the Applicant's practice of Falun Gong. That is not inconsistent with the RPD findings. It is responsive to the Applicant's specific submissions to the RAD.

[61] In this application, the Applicant submitted that the RPD had made a positive finding that he had established Falun Gong knowledge therefore the RAD had a duty to inform him that it would make the Applicant's Falun Gong knowledge an issue. He alleges that he ought to have been given the chance to address those concerns.

[62] The RAD did not raise the Applicant's Falun Gong knowledge as a new issue; it responded to the specific submission raised by the Applicant.

[63] For these reasons and the following, I am not persuaded that the RAD was overzealous in assessing the Applicant's knowledge of Falun Gong.

B. *Did the RAD err in finding the Applicant's 2.5 years of practice was not genuine?*

[64] The Applicant submitted to the RAD, and in this application, that he had provided credible and trustworthy testimony about his Falun Gong practice in Canada for 2.5 years without material omissions or inconsistencies or other credibility concerns with respect to that practice.

[65] The Applicant highlighted that the RPD said his 2.5 years of practice was "impressive", therefore it was unreasonable for the RPD and the RAD to reject those years of practice in favour of making a finding that he was not a genuine Falun Gong practitioner.

[66] The Applicant says that given the RPD finding, it was unreasonable for both the RPD and the RAD to reject his 2.5 years of credible Falun Gong practice.

[67] It is accurate that the RPD did say that the Applicant's years of practice was impressive. However, that was just the first part of the sentence. The RPD finished the sentence by finding that:

. . . it was done solely for the purpose of establishing a *sur place* refugee claim, which is consistent with the claimant's history of

Immigration of making claims for protection on various grounds, none of which are credible, and some of which he actually did not pursue.

[68] The RPD did not reject the Applicant's Falun Gong practice. It drew a distinction between the Applicant's practice of Falun Gong and whether he held a genuine belief in the practice.

[69] The RPD found that the Applicant's answers to questions it posed were vague and insufficient given the length of time he had been practising. The panel also found that his testimony about Falun Gong was not straightforward, and at least one of his answers very clearly appeared to be memorized and recited in response to a question.

[70] The RPD concluded the Applicant's answers to questions about his practice demonstrated a lack of sincerity of belief.

[71] When it conducted a fresh analysis of the Applicant's Falun Gong practice, the RAD reviewed the RPD hearing as well as the CBSA interview. The RAD found, as did the RPD, that the Applicant was not a genuine practitioner of Falun Gong. It found that his knowledge of basic concepts was not commensurate with the length of time he had practiced and studied Falun Gong.

[72] On reviewing the evidence in the underlying record, I find that it supports the conclusion drawn by RAD that the Applicant was not a genuine Falun Gong practitioner.

VIII. Summary and Conclusion

[73] The importance of the Applicant's Falun Gong claim in his supplemental BOC narrative was to support his *sur place* claim.

[74] The RPD found that the Applicant was not a genuine Falun Gong practitioner and that there was insufficient evidence he would suffer persecution upon returning to China as he was not a genuine practitioner. It also found, citing *Jiang v Canada (Citizenship and Immigration)*, 2012 FC 1067 that the credibility finding could be imported into the assessment of the *sur place* claim.

[75] The RAD independently reviewed the Applicant's Falun Gong evidence before arriving at its own conclusion that he was not a genuine practitioner and that he could return to China without fear of persecution. In doing so, the RAD reviewed the National Documentation Package with respect to the monitoring of Falun Gong practitioners outside of China and the treatment of family members. The RAD noted that the Applicant made no submissions with respect to the RPD finding regarding the treatment of Falun Gong practitioners returning to China. It also noted there was no evidence that the Chinese authorities had become aware of the Applicant's Falun Gong activities in Canada and there is no evidence that his family had been approached by the authorities in China.

[76] The Decision is reasonable. It is internally coherent and there is a rational chain of analysis. The outcome is justified in relation to the facts, which are supported by the underlying record and the law.

[77] For all the foregoing reasons, the application is dismissed, without costs.

[78] Neither party suggested that there was a serious question of general importance for certification nor do I find one exists on these facts.

JUDGMENT in IMM-6060-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no serious question of general importance for certification.
3. No costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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