Federal Court  Cour fédérale

Date: 20120820

Docket: IMM-5993-11

Citation: 2012 FC 1004

Ottawa, Ontario, August 20, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LEI HUANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA* or *Act*] to judicially review the decision of member Ron Yamauchi of the Immigration and Refugee Board (the Board) dated August 19, 2011. Member Yamauchi rendered the written reasons for his decision on September 12, 2011. In that decision, he determined that the Applicant is not a Convention refugee and is not a person in need of protection.

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

1. Facts

[3] The Applicant, Lei Huang, is a 28 year-old citizen of the People's Republic of China (China). She came to Canada in 2004 under a student visa to study English at Langara College. She then obtained a bachelor degree in accounting in December 2007 from Cape Breton University.

[4] In 2008, during a celebration of the Chinese New Year, the Applicant met a man nicknamed "Jerry". She immediately became enamoured with him and one month after their initial encounter, the Applicant and Jerry decided to cohabit.

[5] During the course of their relationship, the Applicant claims that Jerry suffered from a gambling addiction. In order to pay his gambling debt, Jerry informed the Applicant of a method to generate revenue with no risk. Jerry provided the Applicant with a credit card. According to the Applicant, she was asked to purchase items suitable for women and Jerry would, in turn, sell them for profit.

[6] In August 2008, Jerry informed the Applicant that his gambling debt was completely paid off. He then gave the Applicant a designer handbag that he was unable to sell and instructed her to return it to the store in exchange for a gift card. The Applicant was arrested at the store under the suspicion of credit card fraud. On January 20, 2009, the Applicant plead not guilty as charged, but plead guilty to the lesser offence that, between May 30, 2008 and August 24, 2008, she did commit an offence of unauthorized use of credit card data, contrary to subsection 342(3) of the *Criminal Code*, RSC 1985, c C-46. The Court imposed a sentence of conditional discharge. The Applicant

was ordered, *inter alia*, to make restitution to various stores in the total amount of $11,952.17 (Applicant's Application Record, p 18). In her statement to the authorities, the Applicant never mentioned Jerry's involvement in the commission of this crime.

[7] On the advice of her father, the Applicant turned to the Christian Church for comfort and guidance following the events with Jerry and the resulting criminal proceedings. According to the Applicant, she has been attending the Wellington Church since October 2008.

[8] In August 2010, the Applicant's father asked her to send him bibles as he felt the Chinese-drafted Christian bibles were incomplete. The Applicant sent these bibles in three shipments. Her father received the first two, but the third was intercepted by the Chinese authorities.

[9] On October 11, 2010, the Applicant learned from her mother that her father had been arrested, convicted of disturbing societal peace and sentenced to one year of re-education through forced labour. The Chinese authorities had also issued a warrant for the Applicant's arrest. Fearing she would face the same fate as her father, the Applicant filed for refugee protection claiming a fear of persecution on the basis of her religious beliefs.

2. The impugned decision

[10] The member recognized that the Applicant's testimony must be presumed to be true unless there are sufficient reasons to doubt its truthfulness. Nevertheless, having considered her testimony and taking into account both the documents she submitted and failed to submit, the member concluded that the Applicant lacked credibility.

[11] The member noted that the root cause of the Applicant's fear of persecution stemmed from her history of fraud, which prompted her to turn to Christianity. However, in her narrative, the Applicant claims that her former boyfriend manipulated her into participating in a number of credit card frauds, and though represented by counsel, she failed to inform the authorities of her former boyfriend's involvement in her predicament.

[12] Moreover, the member found implausible that the Applicant's father, who has been involved in underground churches since 2003, would request his daughter to mail religious materials to China. Her father knew or, at least, should have known of his daughter's temporary status in Canada and the possible consequences of this illegal activity upon the Applicant's return to China.

[13] Additionally, the member considered that the documentary evidence submitted by the Applicant contained a number of anomalies. Firstly, the Applicant submitted a document demonstrating her attendance at Church. However, the dates of attendance began sometime around March 2011, four months after the Applicant filed the claim for refugee protection. The member opined that the Applicant may have "developed" that evidence solely for the purpose of obtaining permanent status in Canada. Secondly, the document provided by the Applicant aimed at demonstrating her father's religiousness and his resulting criminal convictions does not make reference to a criminal conviction for the importation of Christian materials or any other "illegal business practices".

[14] The member attributed little weight to the Applicant's Canadian receipt from a Christian bookstore since the Chinese government chastises the importation of religious materials and not the purchase of those materials in a foreign country. Similarly, the member found the letters and other official-looking documents tendered by the Applicant to be unreliable. He noticed that these documents contained no security features and could have easily been forged, noting that fraudulent documentation is of particular concern with Chinese refugee claims.

[15] Finally, the member took heed of the facts that refugee claimants are not required to submit corroborating evidence, except when such evidence is available or readily obtainable. In this case, the member noted that the Applicant has not provided evidence of the existence of her former boyfriend nor receipts from the courier company proving she mailed materials to China. The member rejected the Applicant's explanations that the courier company destroyed all receipts after one year, noting that Canadian businesses are required to keep proof of their income for a number years in case of a future audit. In any event, the member stated that there is no evidence that the Applicant has contacted the company in writing in order to obtain a copy of her lost receipts.

3. Issues

[16] This application for judicial review raises the following issues:

i) What is the appropriate standard of review?

ii) Was there a breach of the principles of procedural fairness?

iii) Did the member err in concluding that the claim is not credible?

4. Analysis

i) What is the appropriate standard of review?

[17] The Applicant, who is self-represented, argues that it is an appellate standard of review that must apply in light of the Supreme Court decision in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]. The Applicant considers that the member essentially based his conclusions on the Applicant's criminal legal proceedings, without having on hand the Crown's record in these proceedings. According to the Applicant, the Board member erred by drawing the inferences he drew from the Applicant's involvement in another legal proceeding in order to determine her refugee claim. In her view, this amounts to a question of law that must be reviewed on a standard of correctness. Alternatively, the Applicant argues that even if the Court were to apply a standard of reasonableness, the member's decision is vitiated due to a "palpable error".

[18] The Applicant's position on the appropriate standard of review is premised on the Federal Court acting as an appellate court in its review of the member's decision. That proposition is fundamentally flawed. According to subsection 72(1) of the *IRPA*, the Federal Court has jurisdiction to judicially review a decision rendered under the *IRPA*. As a result, the Federal Court does not have "[i]n general […] the right to substitute [its] appraisal of the merits for any lawful action taken by an administrator" (David Phillip Jones, Q.C. & Anne S. de Villars, Q.C., *Principles of Administrative Law*, 4th ed (Scarborough, On: Thomson Canada Limited, 2004) at 6). The Supreme Court has usefully summarized the judicial review process in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 28:

> […] Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is

> therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[19] Therefore, the appellate court standard of review elaborated by the Supreme Court in *Housen*, above, is not the appropriate framework to follow in assessing the standard of review against which the member's decision must be assessed.

[20] In this instance, the member made a series of conclusions related to the plausibility of the Applicant's testimony and the overall credibility of the facts upon which she seeks refugee protection. This constitutes a finding of fact and not a finding of law as stated by the Applicant. Moreover, it is a highly factual determination to which a high degree of deference must be awarded (*Aguebor v Canada (MEI)*, [1993] FCJ no 732 (FCA) at para 4; *Barm v Canada (MCI)*, 2008 FC 893, [2008] FCJ no 1106 at paras 11-12; *Harris v Canada (MCI)*, 2009 FC 932, [2009] FCJ no 1144 at paras 20-24; *Huseynova v Canada (MCI)*, 2011 FC 408, [2011] FCJ no 527 at para 11). It is trite law that the Board is a specialized tribunal endowed with complete jurisdiction to determine matters of credibility. Therefore, this Court will not intervene unless the member's decision is unreasonable as to fall outside the "range of possible, acceptable outcomes which are defensible in respects of the facts and law" (*Dunsmuir*, above at para 47).

[21] As for matters pertaining to procedural fairness, the jurisprudence is clear that they are to be assessed on a standard of correctness (*Dunsmuir*, above at para 129; *Canada (MCI) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

ii) Was there a breach of the principles of procedural fairness?

[22] The Applicant argues that the member breached the principles of procedural fairness in failing to adjourn the hearing or, at the very least, to allow a reasonable length of time after the hearing to gather relevant documentary evidence. She also implied that her counsel failed her in that he should have provided corroborative evidence and she cannot be impugned as a result of that failure.

[23] First of all, it should be noted that the Applicant's claim was referred to the Refugee Protection Board (RPD) on December 10, 2010. On June 23, 2011, she was sent a notice that her claim for refugee protection would be heard on August 19, 2011. She therefore had a period of nine months to prepare her case. Moreover, she had the benefit of legal representation, and neither the Applicant nor her counsel requested an adjournment of the hearing or additional time for submitting evidence. The onus was on the Applicant to put her best foot forward during the hearing itself. It is now too late to fault the member for having breached the principles of procedural fairness, as any desire to look for additional evidence was not previously expressed.

[24] Moreover, Ms. Huang's own actions suggest that she was aware of this requirement, having told the RPD that she attempted to obtain evidence from the courier company that she had sent bibles to her father. The RPD, on finding it unlikely that a Canadian company would not keep records, was entitled to find her explanation problematic due to the lack of corroborative evidence.

iii) Did the member err in concluding that the claim is not credible?

[25] As a preliminary issue, I agree with counsel for the Respondent that the fresh evidence submitted by the Applicant that was not previously before the Board member is not admissible and

cannot be considered by this court on judicial review: see *Kumarasamy v Canada (MCI)*, [2000] FCJ no 969, 184 FTR 105 at para 3; *Singh v Canada (MCI)*, 2007 FC 69, [2007] FCJ no 101 at para 12; *Patel v Canada (MCI)*, [1997] FCJ no 54, CanLII 4786 at para 8. Accordingly, the letter apparently sent to her criminal attorney on September 15, 2011 requesting a complete copy of her file, cannot be taken into consideration. The same is true of the affidavit sworn on March 1, 2012, which endeavours to bring into evidence a letter from a Chinese lawyer stating that the Applicant would receive severe punishment upon her return to China. The affidavit also attempts to introduce various documents and photos aimed at establishing the existence of her former boyfriend Jerry.

[26] Turning to the issue of credibility, the Applicant's primary argument appears to be that the Board member erred in determining that she had been convicted of fraud. She argues that all the credibility findings against her flowed from this erroneous finding, as she never pleaded guilty to fraud, nor has she been convicted of this crime.

[27] In my view, the Applicant exaggerates the implications of the statement made by the Board member that she has a "history of fraud". The member simply found that Ms. Huang admitted to being arrested and ordered to pay back more than $11,000 worth of goods purchased with a stolen credit card. Irrespective of the fact that she has not pleaded guilty and she was not convicted, it should be noted that the Applicant has participated in a criminal wrongdoing as demonstrated by her probation order. Under this order, she was given a three-year probation, was required to pay a victim surcharge and had to follow nine conditions established by the Court. For all practical purposes, the Applicant does have a "history of fraud".

[28] The member could reasonably take into account the Applicant's history of securing benefits through illegal means, in order to assess her overall credibility. Moreover, the Board member considered the explanation Ms. Huang offered with respect to her boyfriend's manipulation. He could justifiably be surprised that Ms. Huang did not tell the police about this, considering that she was represented by counsel. It is not for this Court to re-examine the RPD's finding on this issue.

[29] In any event, the RPD credibility finding was not based on this factor alone, as Ms. Huang suggested, but on several concerns which undermined her credibility. First of all, Ms. Huang could provide no evidence as to either the existence of Jerry or of having sent religious material to China. This is compounded by the fact that the Applicant never attempted to vindicate herself or minimize her implication in the credit card fraud, by informing the Canadian authorities of Jerry's involvement in the crime. Finally, the only evidence that the Applicant ever attended church is a document showing that her attendance at church began four months after filing her claim for refugee protection. This could reasonably raise doubts as to the Applicant's motive for seeking refugee protection.

[30] Ms. Huang also argues that the Board member erred when he found anomalies and implausibilities in her testimony. The member considered implausible that the Applicant's father would request her to send prohibited religious material, knowing that his daughter would eventually return to China and have to face the Chinese authorities. The document submitted purporting to show the disposition of Ms. Huang's father's crime did not on its face appear to refer to the importation of contraband religious material. Ms. Huang states that it is entirely plausible to draw a different conclusion. However, these explanations fall short of demonstrating that the member

"based its decision […] on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Courts Act*, RSC 1985, C F-7, para 18.1(4)(d)). It is not sufficient for an applicant to put forward an alternative line of reasoning. The Board member is entitled to make reasonable findings based on implausibility, common sense and rationality. The same applies to the Board's finding with respect to the Applicant's failure to inform the Canadian authorities that Jerry was the "mastermind" of the credit card fraud.

[31] In light of all the testimonial and documentary evidence, the member could reasonably conclude that the Applicant is not credible. This is not to say that the Applicant is not entitled to a "second chance". The Board's finding is simply that there is insufficient evidence to establish that the Applicant is a Convention refugee or a person in need of protection.

[32] For the foregoing reasons, I find that this application for judicial review must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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