Federal Court  Cour fédérale

**Date: 20140117**

**Dockets: IMM-11815-12**
**IMM-11817-12**

**Citation: 2014 FC 59**

**Ottawa, Ontario, January 17, 2014**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**KE WEI GAO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr Gao, seeks Judicial Review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*Act*"), of two decisions of a Senior Immigration Officer (the "Officer") dated October 2, 2012, one of which refused his application for permanent residence from within Canada on Humanitarian and Compassionate ["H&C"] grounds and the other which refused his Pre-Removal Risk Assessment ["PRRA"] and found that he was not a Convention refugee or person in need of protection pursuant to section 96 or 97 of the *Act*.

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

*Background*

[3] The applicant, Mr Gao, arrived in Canada in 1996 and was refused refugee status in 1998 due to credibility findings. He has remained in Canada since that time. He made an application for a PRRA in 2010 and also updated his H&C application which was first submitted in 2004. The same Officer considered both applications based on similar submissions of the applicant.

[4] The applicant's PRRA submissions were based on the risk he would face if he returned to China given his Falun Gong practice in Canada since 2007. His H&C submissions were based on his establishment in Canada and the hardship and risk he would face if returned to China, again due to his Falun Gong practice.

*The PRRA decision*

[5] The Officer rejected the applicant's PRRA application on the basis that the applicant would not be subject to a section 96 or 97 risk if returned to China.

[6] The Officer noted that the applicant submitted very little evidence to support his application other than: photographs depicting him doing exercises (alone and with others), meditating, protesting in front of the Chinese consulate in Canada, and participating in a Falun Gong parade; country reports; and, a letter from Rev Dai, who is also the applicant's immigration consultant, which stated only that the applicant was a kind man and devout Falun Gong practitioner. The

Officer found that the applicant did not describe his Falun Gong practice, did not provide evidence that he is involved with the Falun Dafa Association of Canada or any other organization, and did not provide letters from other Falun Gong practitioners that he practices with.

[7] The Officer noted that he reviewed the June 8, 1999 Immigration and Refugee Board Report entitled *Canada/China: Whether Falun Dafa (Falun Gong; Falungong) practitioners seeking asylum in Canada can seek corroboration of their status as active practitioners from local Falun Dafa practitioners in Canada*. The Officer cited the Report's reference to a "Public Notice" posted on the Bulletin Board of a website belonging to the Falun Dafa Association of Canada which cautioned that anyone claiming to be a Falun Gong practitioner seeking asylum would have proof from local Falun Gong assistance centers and local Falun Dafa Societies and that those without proof are either fake practitioners or those who seek to damage Falun Gong. The Officer noted that this caution still applied.

[8] As a result the Officer concluded that there was insufficient evidence demonstrating that the applicant "will" be viewed as a Falun Gong practitioner in China if he returns and that he "does not have a well-founded fear of persecution in China due to his Falun Gong involvement in Canada."

[9] The Officer also concluded that the applicant would not be at risk if returned to China due to the one child policy, which was the reason he originally claimed refugee status, or due to his lengthy absence from China.

[10] The Officer further found that the applicant was not at risk under section 97 because he did not provide evidence that he is likely to be tortured due to his allegations of being a Falun Gong practitioner nor did he establish that he faces a risk of death or serious violation of his fundamental human rights.

*The H&C decision*

[11] The Officer also rejected the applicant's H&C application which was based on his establishment in Canada and the risk he faced if he were returned to China. With respect to establishment, the Officer noted that the applicant has had steady employment in the food industry, paid his taxes, helped out with individuals, been involved in his Mainland Chinese Christian Fellowship, attended English classes in the late 1990s, and that his farm in China had been confiscated and that his wife and son remained in China.

[12] The Officer noted that Falun Gong practitioners in China are treated harshly and in a way that violates their basic human rights, but that the applicant had not demonstrated that his involvement in the practice of Falun Gong is such that he will be viewed as a Falun Gong practitioner in China. The Officer noted, however, that if the applicant returned to China and practiced Falun Gong he could be mistreated, and that this had been considered in assessing hardship.

[13] The Officer concluded that, on a balance of probabilities, the applicant would not suffer hardship that would be unusual, undeserved or disproportionate.

*The Issues*

[14] With respect to the PRRA decision, the applicant submits that although the Officer referred to insufficient evidence, the Officer made adverse credibility findings, disbelieving that the applicant was a Falun Gong practitioner and, therefore, the Officer should have held a hearing and provided an opportunity for the applicant to address these concerns. The applicant also submits that the Officer stated and applied the wrong test in assessing risk pursuant to section 96.

[15] With respect to the H&C decision, the applicant submits the decision is not reasonable because the Officer made inconsistent findings of risk in the H&C and in the PRRA. The applicant submits that even if the analysis differs, the finding of mistreatment in the H&C should have been analysed in the PRRA to determine if the mistreatment the applicant would face for practicing Falun Gong upon his return would amount to persecution.

[16] The applicable standard of review for both decisions is reasonableness except with respect to the allegation that the Officer applied an incorrect legal test in determining risk under section 96, which would be reviewed on a standard of correctness.

*The H&C decision is reasonable*

[17] I find that the Officer's decision with respect to the H&C application is reasonable. The PRRA and H&C are separate and distinct schemes; the former assesses risk pursuant to section 96 and 97 and the latter assesses whether returning to the country of origin to make an application for permanent residence would be unusual, undeserved or disproportionate hardship. While the same

allegations may be raised in both, the Officer must make findings related to the application before them. In the present case, the Officer did just that.

[18] Both determinations are based on the same finding that there was insufficient evidence to demonstrate that the applicant would be viewed as a Falun Gong practitioner in China. There is no inconsistency.

[19] In the PRRA, the applicant's claims were assessed to determine if there was a reasonable possibility that he would face a risk of persecution on a Convention ground or if, on a balance of probabilities, the applicant would face a risk of torture, or cruel and unusual treatment or punishment.

[20] In the H&C, the same claims were assessed to determine the hardship that the applicant would face, in the context of whether the overall hardship of returning to China would be unusual, undeserved or disproportionate. The Officer again concluded that the applicant would not be viewed as a Falun Gong practitioner, but in assessing hardship, found that if the applicant returned to China and decided to practice Falun Gong, he could be mistreated. This was expressed as a possibility contingent on the applicant actually practicing Falun Gong.

[21] It was reasonable for the Officer to find that the applicant could be mistreated if he were to practice Falun Gong and that this would be some evidence of hardship, but ultimately it was not sufficient to justify the H&C application, which is an exceptional exemption from applying for permanent residence from within Canada.

*The section 96 test was misstated but the correct test was applied*

[22] The applicant submits that the Officer erred in misstating and misapplying the test for refugee protection under section 96; the Officer's reasons state that there was "insufficient information […] to demonstrate that the Applicant will be viewed as a Falun Gong practitioner in China." The applicant submits that the Officer elevated the test beyond that required which is to demonstrate that the applicant would face a serious possibility or reasonable chance of persecution.

[23] The respondent acknowledges that this one statement does misstate the standard, but that it is apparent that the Officer applied the correct standard. Moreover, the applicant failed to demonstrate that he faced a serious possibility of persecution.

[24] I agree that the reasons read as a whole demonstrate that the Officer applied the correct test in assessing risk pursuant to section 96 and determining that the applicant would not face a serious possibility of persecution because he had not established his claim that he practised Falun Gong.

[25] The test was established by the Federal Court of Appeal in *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 at para 8, [1989] FCJ No 67:

> "What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility."

[26] As in *Paramanathan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 338, [2012] FCJ No 377, the misstatement is not fatal because the Officer did understand the correct test and applied it. As noted by Justice Near at paragraph 24:

> Admittedly, the Board could have been clearer in its choice of wording. The statements referred to do not suggest, however, that an inappropriately high threshold was ultimately applied. The Board simply concluded that the Applicant had not established subjective or objective fear of persecution in accordance with the relevant tests.

[27] Similarly in this case, the Officer should have been more accurate in setting out the test, but the decision as a whole demonstrates that the Officer did not hold the applicant to a higher standard of risk.

*The Officer did not make veiled credibility findings*

[28] The key issue is whether the Officer's determination that there was insufficient evidence was reasonable or whether the determination was in essence, an adverse credibility finding that should have triggered an oral hearing.

[29] The applicant submits that although the PRRA decision was framed in terms of sufficiency of evidence, the Officer rejected the application because he did not find the applicant's evidence that he is a Falun Gong practitioner to be credible, particularly because his affidavit evidence was not corroborated by a Falun Gong organization or other practitioners.

[30] The applicant submits that section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provides that a hearing should be held in certain circumstances where there is evidence that raises a serious issue of the applicant's credibility; where that evidence relates

to the risk factors set out in sections 96 and 97 and is central to the decision; and if accepted, would justify the application for protection.

[31] The respondent submits that the Officer did not make a credibility finding; rather, he found that there was insufficient evidence.

[32] I note that in some cases it is difficult to draw a distinction between a finding of insufficient evidence and a finding that the applicant was not believed i.e. was not credible. The choice of words used, whether referring to credibility or to insufficiency of the evidence is not solely determinative of whether the findings were one or the other or both. However, it can not be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant.

[33] In *Herman v Canada (Minister of Citizenship and Immigration)*, 2010 FC 629 at para 17, [2010] FCJ No 776, Justice Crampton differentiated *Liban v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252, [2008] FCJ No 1608 [*Liban*] and other cases on veiled credibility findings, stating:

> In my view, those cases do not stand for the proposition that a PRRA Officer in essence makes an adverse credibility finding every time he or she concludes that the evidence adduced by an Applicant is not sufficient to meet the Applicant's evidentiary burden of proof. In each of those cases, it was clear to the Court that the PRRA Officer either had made a negative credibility finding, or simply disbelieved the evidence presented by the Applicant. This is very different from not being persuaded that an Applicant has met his or her burden of proof on the balance of probabilities, without ever having considered whether the evidence is credible.

[34] In *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 16, [2008] FCJ No 399 [*Carillo*], the Court of Appeal noted that the burden of proof, standard of proof and the quality of the evidence necessary to meet the standard of proof are different legal concepts which should not be confused.

[35] In *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, [2008] FCJ No 1308 [*Ferguson*], Justice Zinn cited *Carillo* and reiterated the difference between the evidentiary burden and the legal burden on the applicant and the standard of proof. In *Ferguson*, the applicant claimed she was at risk of persecution because she was a lesbian. The Officer found there was insufficient evidence, but the applicant argued this was really a credibility finding – he did not believe the submission by counsel that she was a lesbian, and therefore should have held a hearing.

[36] Justice Zinn noted that the applicant bears the burden of proof on a balance of probabilities that he or she would be at risk of persecution. This is met by presenting evidence to the officer to establish the facts which must be proved. The officer then weighs the evidence. Whether the legal burden is met will depend on the weight attached to the evidence. This may first involve an assessment of credibility, and if found not to be credible, no weight will be attached to the evidence. But, as noted by Justice Zinn, the officer may either go on to weigh evidence that he has found to be credible or may move directly to weighing the evidence without making any credibility findings:

> [26] If the trier of fact finds that the evidence is credible, then an assessment must be made as to the weight that is to be given to it. It is not only evidence that has passed the test of reliability that may be assessed for weight. It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to the first question is irrelevant because the evidence is to be

> given little or no weight, even if it is found to be reliable evidence. For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be ascribed little weight, whether it is credible or not.
>
> [27] Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment the officer made in this case.

[37] Justice Zinn also noted that deference is owed to the PRRA Officer:

> [33] The weight the trier of fact gives evidence tendered in a proceeding is not a science. Persons may weigh evidence differently but there is a reasonable range of weight within which the assessment of the evidence's weight should fall. Deference must be given to PRRA officers in their assessment of the probative value of evidence before them. If it falls within the range of reasonableness, it should not be disturbed. In my view the weight given counsel's statement in this matter falls within that range.
>
> [34] It is also my view that there is nothing in the officer's decision under review which would indicate that any part of it was based on the Applicant's credibility. The officer neither believes nor disbelieves that the Applicant is lesbian – he is unconvinced. He states that there is insufficient objective evidence to establish that she is lesbian. In short, he found that there was some evidence – the statement of counsel – but that it was insufficient to prove, on the balance of probabilities, that Ms. Ferguson was lesbian. In my view, that determination does not bring into question the Applicant's credibility.

[38] The applicant submits that *Ferguson* should be distinguished because in that case the applicant had not provided a sworn statement.

[39] While the facts differed in that respect, the same distinctions between the evidentiary and legal burden and the standard of proof remain and the weight to be given to evidence remains the role of the PRRA Officer. In the present case, the applicant did provide a statutory declaration which is presumed to be true, but it said very little and, along with the other evidence, did not satisfy the PRRA officer that the applicant was a Falun Gong practitioner. In *Ferguson*, Justice Zinn noted that the statement from the applicant's counsel, rather than the applicant herself, could be evidence in the PRRA with the appropriate weight attached by the PRRA Officer, but reasonably concluded overall that the applicant had not provided sufficient evidence to establish she was a lesbian.

[40] The applicant submits that the present case is more akin to *Liban* where Justice O'Reilly found that the findings of insufficient evidence were really credibility findings and that a hearing should have been held:

> [13] The officer's reasons persuade me that a hearing was required here. First, the officer seemed to place considerable emphasis on the credibility findings of the Immigration Appeal Division. Second, the officer found that there was insufficient objective evidence to support Mr. Liban's claim that he had a relationship with Jimmy. Third, the officer found that there was insufficient objective evidence to support Mr. Liban's claim to be an alcoholic. Fourth, the officer seemed to accept that homosexuals and alcoholics would be subjected to mistreatment in Ethiopia. Therefore, if Mr. Liban's evidence relating to his sexuality and alcoholism had been accepted, the officer would likely have allowed the application.
>
> [14] In my view, when the officer stated that there was "insufficient objective evidence" supporting Mr. Liban's assertions, he was really saying that he disbelieved Mr. Liban and, only if Mr. Liban had presented objective evidence corroborating his assertions,

> would the officer have believed them. To my mind, these findings are conclusions about Mr. Liban's credibility. They were central to his application. If the officer had believed Mr. Liban, the officer, in light of the documentary evidence he accepted, would likely have found that Mr. Liban was at risk.

[41] In the present case, the Officer's reasons referred only to the insufficiency of the evidence. Although the Officer noted that credibility had been fatal to the applicant's refugee determination in 1998, the Officer did not import those findings into the PRRA determination. The Officer addressed the other claims of the applicant and found that the applicant had not provided evidence that he would be detained upon return because he had been gone so long - i.e. insufficient evidence -, and also found that he would not be in violation of the one child policy because he had only one child. In assessing the risk of persecution due to his practice of Falun Gong, the Officer consistently and repeatedly used the terms "insufficient information" , "very little evidence ", and "the applicant has submitted very little else" when describing the evidence.

[42] The applicant's evidence consisted of his statutory declaration, pictures, and the letter from the Rev Dai, who was also the applicant's Immigration Consultant and which was based on information provided by the applicant. The Officer referred to the Report of the Immigration and Refugee Board which noted, among other information, that a local practitioner had commented that some persons joined protests and demonstrations solely for the purpose of being photographed. The Officer also indicated that he gave low weight to the letter from Rev Dai. The Officer commented that there were no documents from the Falun Dafa Association or other persons that the applicant practiced with, and more generally that the applicant had provided little information about his own practice of Falun Gong.

[43] Unlike *Liban*, I can not conclude that the Officer was really signalling that he disbelieved the applicant and that the findings about the lack of sufficient evidence were conclusions about the applicant's credibility.

[44] Rather, the Officer, as in *Ferguson*, assessed the evidence submitted and its probative value and neither believed nor disbelieved the applicant but was simply not satisfied that the applicant had provided sufficient evidence that he would be viewed as a Falun Gong practitioner.

[45] The onus is on the applicant to establish his claim with evidence that will meet the evidentiary and legal burden. The applicant would have known or been advised that a hearing was not the norm for a PRRA and that he had to put his best foot forward to establish on a balance of probabilities that he was practicing Falun Gong and that there would be a reasonable chance or a serious possibility that he would be at risk of persecution as a result if he were to return to China.

[46] In this case, the Officer reasonably concluded that the applicant had not established that he was practicing Falun Gong and that he would be viewed as a Falun Gong practitioner.

[47] The finding was reasonably open to the Officer to make. The Court can not reweigh the evidence, as that is the role of the Officer. The Officer considered all the evidence presented and provided justification for his findings. The decision meets the *Dunsmuir* standard as it "fall(s) 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, [2008] 1 SCR 190). There may be several reasonable outcomes and "as long as the process and the outcome fit comfortably with the

principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review of both decisions of the Senior Immigration Officer Immigration is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKETS:** | IMM-11815-12<br>IMM-11817-12 |
| **STYLE OF CAUSE:** | KE WEI GAO v<br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 11, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KANE J. |
| **DATED:** | JANUARY 17, 2014 |

**APPEARANCES:**

| | |
|---|---|
| Douglas Lehrer | FOR THE APPLICANT |
| Meva Motwani | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| VanderVennen Lehrer<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |