Federal Court  Cour fédérale

Date: 20160707

Docket: IMM-40-16

Citation: 2016 FC 765

Ottawa, Ontario, July 7, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

HUI ZHANG, RONGWO LIANG

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [the Act] of a decision by the Refugee Appeal Division [the RAD] of the Immigration and Refugee Board. In its decision, the RAD confirmed a decision by the Refugee Protection Division [the RPD] determining that the Applicants were neither Convention refugees nor persons in need of protection. The decision is dated December 10, 2015.

II. Facts

[2] The Applicants are citizens of China from Jiangmen in the province of Guangdong. They allege a fear of persecution at the hands of authorities in China as they were engaged in the illegal practice of Falun Gong.

[3] In October 2013, the female Applicant, Ms. Zhang, alleges that she began to practice Falun Gong with a friend, who informed her that it would help cure her insomnia after having unsuccessfully resorted to sleeping pills. She noticed an improvement in her health, so she joined a practice group and continued to practice at home.

[4] In February 2014, the male Applicant, Mr. Liang, also began to practice Falun Gong. The Applicants were aware that it was an illegal practice in China but were told that good precautions were taken during their practice sessions to ensure the authorities would remain unaware.

[5] Nonetheless, on June 1, 2014, the Public Service Bureau [the PSB] raided their practice group. The Applicants escaped and fled to a family member's home, not far from where they lived. There, they were informed that the PSB had arrested some of their fellow practitioners and had visited their home to look for them. The PSB left a summons demanding that the Applicants attend court for being involved in Falun Gong activities.

[6] On June 10, 2014, the Applicants acquired visas to travel to Cambodia. They allege that they requested these visas before the arrest and were told by a smuggler they had hired to help

them flee China not to use them. On June 27, 2014, they attended the American Consulate in Guangzhou and obtained visas for the United States.

[7] On August 12, 2014, the Applicants travelled to Hong Kong using their own passports. They allege that they then attempted to fly to the US from there but could not board the flight because their US visas were not valid. Upon the advice of the smuggler, they returned to China and went back into hiding.

[8] The Applicants received visas for Canada on October 23, 2014. They travelled from China to Canada on November 15, 2014 and filed for refugee protection two weeks later.

[9] The Applicants' application for refugee status was denied by the Refugee Protection Division on February 20, 2015. The RPD found that they were not credible witnesses and were not genuine Falun Gong practitioners. The Applicants appealed that decision to the RAD shortly thereafter.

III. Decision

[10] Preliminarily, the RAD noted that, per *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 [*Huruglica FC*], it would conduct an independent assessment of the record and come to its own determination of whether the Applicants were Convention refugees or persons in need of protection, deferring only where the RPD has a clear advantage, such as in making credibility findings.

[1] The RAD then stated that, in reviewing the totality of the evidence, the determinative issue was credibility and that the Applicants had not established their identities as genuine Falun Gong practitioners.

[2] First, the RAD accepted, as the RPD had, that the Applicants were knowledgeable about Falun Gong exercises and philosophy but noted that this, in and of itself, does not establish that they are genuine practitioners.

[3] The RAD then turned to the Applicants' timeline for fleeing China, noting that the alleged PSB raid occurred on June 1, 2014 and they were allegedly being actively pursued from that point forward. The RAD further observed that they acquired visas to travel to Cambodia and to the United States (both signatories to the *United Nations Convention Relating to the Status of Refugees*) within a short time of the alleged raid. Nonetheless, it was not until August 12, 2014 that they flew to Hong Kong and attempted to leave the country. The RAD considered the Applicants' explanation for this delay – that they were working under the instructions of a smuggler – but found that if they had genuinely feared for their lives they would have taken advantage of their ability to leave much earlier than they did.

[4] The RAD further noted that the Applicants then returned to China. The Applicants alleged that their US visas were found not valid and so they had to return. The RAD drew a negative inference from the fact that they made no inquiries at the US Consulate, in the subsequent three months they allegedly spent in hiding back in China, as to what their visa status was. Considering they had come out of hiding to attend an interview at the Consulate to acquire

the visas in the first place, the RAD found it reasonable to expect they would have followed up: had they genuinely feared for their lives, they would have made some kind of effort to speed up their departure.

[5] The RAD also observed that the Applicants received visas to come to Canada on October 23, 2014 but did not leave until November 15, 2014. The Applicants argue that they delayed their departure on the instructions of the smuggler. The RAD considered this but again found that this delay while an opportunity to escape existed weighed strongly against the Applicants' claims of subjective fear and their credibility more generally.

[6] The RAD then turned to the fact that the Applicants left and returned to China on August 12, 2014, using, on all exits and entries, their own passports. The RAD found it reasonable to expect, in light of documentary evidence that airport officials have access to computer systems that allow them to see if an individual is wanted by the authorities and that the PSB monitors departures from the country, that the Applicants would have been stopped from exiting China if they were truly sought by the PSB. The RAD accepted that authorities in China do not always apply regulations evenly and that corruption must be considered but concluded nonetheless that the Applicants' actions in this respect show that the authorities in China were not looking for them.

[7] As for the PSB summons that the Applicants provided, the documentary evidence suggested that a written summons can only be issued after a case has been filed for investigation. The RAD thus concluded that it was reasonable to expect that more documents would have been

left at the house, beyond just the summons itself. The RAD further found that it was unlikely that if a PSB summons had been issued they would have been able to exit and re-enter China on their genuine passports, and that their return to China in spite of the persecution they feared diminished their credibility as well.

[8] Finally, the RAD noted that it is easy to obtain fraudulent documents in China, particularly in Guangdong.

[9] The RAD then looked to the evidence that the Applicants were practicing Falun Gong in Canada. This element of the RAD decision – the *sur place* claim – served as the focus of this judicial review. The RAD noted that the Applicants provided pictures of themselves practicing and two letters of support from other practitioners. The RAD did not find that this evidence provided sufficient proof that they are genuine practitioners, however, and accorded them low weight, echoing the RPD's findings on this issue.

[10] In its earlier decision, the RPD drew a negative inference from the fact that the Applicants had not received a letter of support from the Falun Dafa Association of Canada. The Applicants took issue with this finding. The RAD considered this objection and concluded that while in some cases such a letter could be beneficial, due to other significant credibility concerns, the letter would not have been sufficient to establish them as genuine practitioners, even if it had been provided in this case.

[11] Finally, the RAD determined that there was insufficient evidence to conclude that the Applicants' practice of Falun Gong in Canada had come to the attention of the Chinese

authorities. The RAD cited *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1237 [*Wang*] in support of its conclusion.

[12] Ultimately, since the RAD found, on a balance of probabilities, that the Applicants were not genuine practitioners, either in China or in Canada, it felt that they would not be perceived as such in China should they return. As a result, the RAD rejected the appeal of their original claim, as well as any *sur place* claim.

IV. Issues

[13] The Applicants argue that the RAD erred both in the legal test it applied and in its assessment of the *sur place* claim.

V. Analysis

A. *Standard of Review*

[14] The Federal Court of Appeal recently stated that the RAD must review the RPD decision before it on a correctness standard, conducting "its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred" (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103 [*Huruglica FCA*]). The RAD's selection of a standard of review must then be reviewed by this Court on a reasonableness standard (*Huruglica FCA* at para 35).

[15] Here, the RAD selected and applied the standard laid out in *Huruglica FC*, a standard which has since been replaced by the approach offered in *Huruglica FCA*. That said, I find that

in substance the RAD engaged in precisely the type of review endorsed in *Huruglica FCA*. The RAD's selection and application of a standard of review was therefore reasonable (*Ketchen v Canada (Citizenship and Immigration)*, 2016 FC 388 at para 29; *Sui v Canada (Citizenship and Immigration)*, 2016 FC 406 at para 16).

[16] As for the RAD's determination of the *sur place* claim, I find that, despite the Applicant's contention that the law as laid out in *Wang* was misapplied and thus a correctness standard applies (see below), this determination was instead a finding of fact and mixed fact and law and is thus reviewable on a reasonableness standard (*Ghamooshi v Canada (Citizenship and Immigration)*, 2016 FC 225 at para 15). As such, if the RAD's decision on these issues falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law and is justifiable, transparent and intelligible, it should not be disturbed (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

B. *Did the RAD err in its analysis of the sur place claim?*

(1) Misapplying *Wang*

[17] When analysing the *sur place* claim, the RAD stated that there was no evidence to indicate that the Applicants' actions in Canada had come to the attention of authorities in China. Therefore, as per *Wang*, the RAD found that this claim could not be supported:

> [37] The RAD, in its review of the record, finds that there was insufficient reliable evidence and satisfactory probative evidence submitted/adduced at the RPD, including during the RPD hearing, to show that the Appellants' practice of Falun Gong has come to the attention of Chinese authorities or that they would be perceived to be genuine Falun Gong practitioners upon return to China. In

> this respect, the RAD is guided by the Federal Court Trial Division decision in *Wang* which held that a *sur place* claim could not be maintained in the absence of evidence that the making of the refugee claim had specifically come to the attention of the authorities of the claimant's country of origin.

[18] The Applicants argue that the RAD misconstrued the evidence and that *Wang* does not apply. According to the Applicants, *Wang* involved a distinct set of facts: there, the claimant based his *sur place* claim on the fact that his application for refugee status had been reported in the Chinese media. The *sur place* claim in *Wang*, in other words, depended by necessity on proving that the media attention existed and would make the authorities pay attention to the claimant. The Applicants submit that this does not, as the RAD has interpreted it, translate into a broad general proposition that any *sur place* claim must provide evidence that the making of the claim had come to the attention of the authorities in the Applicant's home country.

[19] I disagree and find the RAD's analysis on this point reasonable. Regardless of the particular facts in *Wang*, Justice Pelletier was clear in that case that "the essential problem for the applicants is the fact that no evidence was before the [Convention Refugee Determination Division], documentary or otherwise, that substantiated their sur place allegation" (para 20). In other words, *Wang* stands simply for the proposition that a *sur place* claimant, like any claimant, must have an evidentiary basis for their allegations.

[20] A similar conclusion was drawn here: the RAD evaluated the evidence and did not believe, on a balance of probabilities, that the Applicants were actual practitioners in Canada. Nor was there any evidence that Chinese authorities believed that they were. The RAD assessed the evidence before them independently in arriving at this conclusion, consistent with the

instructions of *Huruglica FCA*. As such, while the RAD may have phrased its assessment better, I do not find that it misapplied the law relating to *sur place* claims or otherwise erred unreasonably.

(2) Ignoring evidence

[21] The Applicants argue that the RAD overlooked crucial evidence, including photographs, letters, and objective country condition information, in concluding that there was insufficient proof of their Falun Gong practice in Canada.

[22] I do not find, however, that the RAD ignored, overlooked, or was otherwise unreasonable in its treatment and consideration of the evidence. First, the RAD is presumed to have reviewed all of the evidence presented to it and need not refer to each piece explicitly (*Kandha v Canada (Citizenship and Immigration)*, 2016 FC 430 at para 16). Second, none of the pieces of evidence that the Applicants point to in their submissions before this Court are so crucial that the decision not to address them renders the decision itself unreasonable. This is because the documentary evidence they highlight was, according to the RAD of little probative value in light of its credibility concerns vis-à-vis the Applicant's alleged narrative of events in China – concerns that, as noted by the Respondent, the Applicants do not contest. Since there is nothing unreasonable in the RAD's decision to give more weight its credibility concerns than to the documentary evidence (see below), the Applicants are simply asking this Court to reweigh the evidence and come to a different determination, something that it cannot do under a reasonableness review.

(3) Prior credibility findings

[23] The Applicants argue that the RAD's credibility concerns regarding their experiences in China should not have played a role in the assessment of their *sur place* claim. Because they did, the RAD's analysis of their *sur place* claim was itself unreasonable.

[24] The Applicants rely on Justice Zinn's decision in *Huang v Canada (Citizenship and Immigration)*, 2012 FC 205 [*Huang*] for the proposition that evidence of a claimant's *sur place* claim cannot be discounted simply because of the RAD's skepticism about their claim relative to their country of origin:

> [32] Even if the principal applicant was not a Christian in China, there is evidence that she attends a Christian church in Canada and participates in its activities. Perhaps, like Saul on the road to Damascus, she had a revelation and a spiritual awakening in Canada; perhaps not. However, in order to arrive at a decision as to the genuineness of her current beliefs some analysis must be made of the evidence and if her evidence is to be totally discounted, some justification must be provided for that decision. Here there is none. The Board merely states the conclusion it has reached and it is impossible for the Court, on the basis of the record, to ascertain why that conclusion was reached.

[25] The Respondent replies that there is nothing unreasonable in making a conclusion about a claimant's alleged activities within Canada in light of credibility findings relative to the claimant's narrative in their country of origin. The Respondent notes that this Court has upheld RAD decisions that have applied the same reasoning: see, for example, *Jiang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1067 at para 28 [*Jiang*] ("[t]his Court has held that it is permissible for the Board to assess an applicant's genuineness and therefore its sur place claim in light of credibility concerns relating to the original authenticity of a claim"); and *Zhou v*

Canada (Citizenship and Immigration), 2015 FC 5 [*Zhou*]. In both cases, as in the instant case, there were conclusive credibility findings made about a claim relating to Falun Gong practice in China, along with relatively sparse evidence of further genuine practice in Canada.

[26] As *Jiang* and *Zhou* demonstrate, there is nothing unreasonable in considering a prior credibility determination when assessing a *sur place* claim. This fact is not contradicted by *Huang*, where Justice Zinn took issue not with the RPD's reliance on a credibility determination in assessing a sur place claim, but with the fact that "there is no support in the decision or in the record for the finding the Board made that 'the claimant joined a Christian church in Canada only for the purpose of supporting a fraudulent refugee claim' [emphasis added]" (para 31). In other words, *Huang* involved a conclusion made without any supporting evidence, unlike the case at hand. As such, I do not find that the RAD erred on this point.

VI. Conclusion

[27] In light of the above, this application for judicial review is dismissed. No questions are certified and no costs are ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. There is no award as to costs.

3. There are no questions for certification.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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