Federal Court  Cour fédérale

Date: 20170209

Docket: IMM-3316-16

Citation: 2017 FC 146

Ottawa, Ontario, February 9, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

WEIHAO YAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Weihao Yan [the Applicant], pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated May 8, 2016, in which the Applicant was found to be neither a Convention refugee nor a person

in need of protection under sections 96 and 97 of the *IRPA* [the Decision]. Leave was granted November 8, 2016.

II. Facts

[2] The Applicant is a 21-year-old citizen of China. He alleges fear of persecution on the ground of religion, namely, as a member of the Church of Almighty God (also known as the Church of Eastern Lightening) [Almighty God/Eastern Lightening]. He alleges he has been a member for two years. The Almighty God/Eastern Lightening religion is viewed as an "evil cult" in China; its practice there is illegal and is repressed by Chinese government authorities.

[3] The Applicant alleges that he became a member of Almighty God/Eastern Lightening in October 2013 after losing a friend in a motorcycle accident and seeing another motorcycle accident resulting in death shortly thereafter. He alleges he became increasingly depressed, pessimistic and disappointed with human life. His friend spoke to him about Almighty God/Eastern Lightening after the first accident, but the Applicant declined the invitation. After the second accident, his friend spoke with him again. The Applicant decided to attend a service.

[4] The Applicant's refugee claim arises from an event that allegedly occurred in March 2014, at which time several Public Service Bureau [PSB] officers raided the house church at which he was attending an Almighty God/Eastern Lightening service and arrested three members. The Applicant was able to escape. While in hiding, the Applicant alleges that the PSB came to his house looking for him. They interrogated his parents as to his religious activity and whereabouts and ordered he report the next day. After the Applicant failed to report, the PSB

returned to his home and left a summons for him. The Applicant alleges he was terminated from his job. He decided to leave China.

[5] The Applicant obtained a U.S. student visa with the assistance of a smuggler, who travelled with the Applicant to the U.S. After remaining in the U.S. for an unstated amount of time, the Applicant allegedly entered Canada illegally by walking through a park from Seattle to Vancouver. He then flew to Toronto and claimed refugee status there. The Applicant conducted these travels using his own passport. He claims to have travelled to Canada from the U.S. after staying there only one day, but the objective evidence is only that he arrived in the U.S. on June 10, 2014 and signed his Basis of Claim [BOC] form in Toronto six weeks later. Since fleeing, the Applicant alleges the PSB has come looking for him three times, most recently in February 2016.

[6] The Minister filed a Notice of Intervention at the RPD stage, stating that significant portions of the Applicant's BOC narrative resembled those of three other files, thereby giving rise to serious credibility concerns. These other narratives were included as exhibits and are contained in the Certified Tribunal Record, but are not at issue in this judicial review.

III. Decisions

i) RPD Decision

[7] On March 2, 2016, the RPD Panel found the Applicant was neither a Convention refugee nor a person in need of protection. The determinative issues were the Applicant's credibility and his identity as a member of the Church.

[8] The Panel made several negative inferences. First, it drew a negative inference from the Applicant's ability to leave China on his own passport. It considered the treatment of Almighty God/Eastern Lightening members, the documentary evidence concerning exit and entry law and the Golden Shield Project (the national computer network of policing in China, to which airport authorities are connected) and noted the systematic corruption in China. The Panel found, on a balance of probabilities, that the Applicant was able to leave China on his own passport without any difficulty because he was not wanted by the PSB.

[9] Second, the Panel drew a negative inference from the Applicant's illegal entry into Canada and his failure to claim in the U.S., finding it unreasonable and implausible that the Applicant, fearing arrest in China, would take the chance of being arrested for illegally entering Canada. It found the Applicant had failed to provide a reasonable explanation for his actions.

[10] Third, the Panel found the summons issued to the Applicant was consistent with a criminal summons and drew a negative inference from the PSB's failure to issue a coercive summons following the Applicant's failure to report. The Panel also drew negative inferences from the Applicant's lack of spontaneity when responding to questions about his introduction to the religion, his inability to answer questions about the basic tenets of the religion and his inability to recount the substance of his initial conversation with his friend. The Panel assigned little weight to the supporting documentary evidence, finding it could attest to the Applicant's participation in church activities but not to his motivation. The Panel also assigned little weight to the Applicant's letter of termination.

[11] The Applicant appealed this decision to the RAD.

ii) RAD Decision

[12] On July 13, 2016, the RAD upheld the finding of the RPD and determined that the Applicant was neither a Convention refugee nor a person in need of protection. The RAD did not accept the Applicant's evidence as credible either with respect to his passage through China's exit controls on his own passport while wanted by the PSB, or his allegation of being wanted by the police. The Applicant disagrees with the result and seeks judicial review.

[13] The RAD's reasons are set out below together with the Court's analysis.

IV. Issues

[14] The issue is whether the RAD decision is reasonable.

V. Standard of Review and Legal Principles

[15] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." A decision by the RAD reviewing a finding by the RPD is to be reviewed by this Court on the standard of reasonableness. The Federal Court of Appeal has stated in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, that the

RAD is to review the RPD's findings on the standard of correctness, but may defer to the RPD on credibility findings "where the RPD enjoys a meaningful advantage".

[16] In *Dunsmuir*, above at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] The starting point for assessing credibility is that the applicant is presumed to tell the truth: *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA). This presumption is rebuttable; where the evidence is inconsistent with the applicant's sworn testimony, the presumption may be rebutted: *Su v Canada (Citizenship and Immigration)*, 2015 FC 666 at para 11, Fothergill J [*Su*], citing *Adu v Canada (Minister of Employment and Immigration)* (1995), 53 ACWS (3d) 158, [1995] FCJ No 114 (FCA).

[18] Relevant authorities on the assessment of credibility and plausibility are summarized as follows. First, the RPD has broad discretion to prefer certain evidence over other evidence and to determine the weight to be assigned to the evidence it accepts: *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61 at para 16, Tremblay-Lamer J; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 867 at para 68, Blais J. Second, the Federal Court of Appeal confirms that findings of fact and determinations of credibility fall

within the heartland of the expertise of the RPD: *Giron v Canada (Minister of Employment and Immigration)* (1992), 143 NR 238 (FCA). Third, the RPD is recognized to have expertise in assessing refugee claims and is authorized by statute to apply its specialized knowledge: *Chen v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 805 at para 10, O'Reilly J; see *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA), where the Federal Court of Appeal said that the RPD, "… is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within "the heartland of the discretion of triers of fact", are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence". Third, it is well-established that the RPD may make credibility findings based on implausibility, common sense and rationality, although adverse credibility findings "should not be based on a microscopic evaluation of issues peripheral or irrelevant to the case": *Haramichael v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1197 at para 15, Tremblay-Lamer J, citing *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 10-11, Martineau J [*Lubana*]; *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (FCA). Fourth, the RPD may reject uncontradicted evidence if it "is not consistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence": *Lubana*, above at para 10. Fifth, the RPD is entitled to conclude that an applicant is not credible "because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in 'clear and unmistakable terms'": *Lubana*, above at para 9.

[19] The Supreme Court of Canada instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy*

and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Analysis

A. *Finding that exit from China on own passport not plausible*

[20] The RAD reviewed the most recent documentary evidence and noted the fact of corruption in China. On the facts in this case, the RAD distinguished *Zhang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 533, Dawson J, as she then was, *Sun v Canada (Minister of Citizenship and Immigration)*, 2015 FC 387, de Montigny J and *Ren v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1402, Boswell J. In my view, the RAD acted reasonably in this respect because the country condition information before this RAD was more up to date and was not before the Court in the earlier decisions, specifically in regard to China's exit controls and the Golden Shield. In my respectful view, decisions concerning China's exit controls based on earlier or different country condition evidence, while important for the principle that each case must be determined on the evidence, are not determinative of subsequent applications such as this. These determinations are both fact-driven and findings in respect of which the RPD and RAD are entitled to a degree of deference given they are both specialized tribunals. In this case, more recent evidence supported the RAD's determinations in this respect.

[21] In my view, it was also reasonable for the RAD to conclude there was insufficient evidence that the smuggler had bribed any border control officials, that it was highly implausible the smuggler would know who to bribe and that it was not plausible that the Applicant was able to exit China on his own passport given China's exit controls. In my respectful view, this finding is reasonable not only because it is supported by updated country condition evidence, but because it is grounded in common sense, rationality and the record. I note that the RAD decision in this respect has support in by *Zeng v Canada (Citizenship and Immigration),* 2014 FC 1060, O'Keefe J, *Su,* above, and *Cao v Canada (Citizenship and Immigration),* 2015 FC 315, Noël J.

B. *Failure to claim or explain stay in the U.S.*

[22] The RAD also drew a negative inference from the Applicant's failure to claim in the U.S. and the risk he took in entering Canada illegally. It found the Applicant had not provided an adequate explanation for why he did not or could not claim in the U.S. In conclusion, the RAD agreed with the RPD and found the Applicant's failure to claim asylum in the U.S. undermined both the credibility of his allegations and his subjective fear. These conclusions are supported by the evidence and, in particular, by the lack of evidence respecting when exactly the Applicant entered Canada. I pause to note that this lack of evidence is, of course, entirely a consequence of the Applicant's decision to enter the country illegally. In any event, the onus was on the Applicant to prove the date he entered Canada if he wanted the RAD to find he only spent a day in the U.S.; he failed to meet his burden in this respect.

C. *Summons submitted not plausible*

[23] The RAD found the RPD failed to adequately explain why it determined the summons submitted by the Applicant was a criminal summons. The RAD reviewed the matter afresh, with the benefit not only of the country condition evidence but its own expertise and, in my respectful view, reasonably found the summons offered by the Applicant was inconsistent with a criminal summons. Instead, the RAD found the summons was consistent with a Public Security Summons (non-coercive summons). In light of the objective evidence and the Applicant's allegations, the RAD determined that it was reasonable to expect a *coercive* summons to have been issued by the PSB after the Applicant's failure to report. The RAD reasonably concluded that the absence of a coercive summons undermined the genuineness of the summons tendered by the Applicant; in my view, the RAD reasonably assigned it little weight. The RAD also agreed with the RPD's assessment of the other documents submitted and determined that, in any case, the termination letter did not overcome the totality of the adverse credibility findings made against the Applicant's claim. I am not persuaded that the RAD acted unreasonably in these respects.

D. *Credibility findings at the hearing*

[24] It is also relevant that the RAD deferred to the RPD on its assessment of the Applicant's lack of spontaneity and related adverse credibility finding. It agreed with the RPD and found the Applicant's failure to discuss important elements of his first conversation with his friend, namely, the significance of traffic fatalities to the religion, undermined his credibility. The RAD also found the Applicant's knowledge and practice to be inconsistent with his alleged religious profile, further undermining his credibility on this ground. The RAD acknowledged the RPD's analysis on the *sur place* claim would have benefitted from further reasoning but found that the RPD did, in fact, consider the Applicant's activities in Canada. The RAD concluded that:

> Having found that he was not a practitioner in China and having no evidence of desire to begin the practice in Canada, the RAD finds, on a balance of probabilities and in the context of the findings noted above, that the [Applicant] engaged in Christian activities in Canada only for the purpose of furthering a fraudulent refugee claim.

[25] Again, these findings centre on credibility, in respect of which deference is owed to the RAD as matter lying at the heartland of its jurisdiction. In my respectful view, the RAD's findings on credibility on this point are reasonable.

E. *The sur place claim*

[26] An overall finding that an Applicant's evidence lacks credibility may form the basis of the RAD's decision to discount evidence relied upon in establishing a *sur place* claim. Moreover, the RPD did consider the Applicant's activities in Canada, but found them undermined by his vague and hesitant testimony. I am unable to fault the RAD's conclusion that the evidence was insufficient for a *sur place* claim.

[27] Judicial review concerns the totality of the reasons which are to be examined as an organic whole. Considering the findings outlined above, I have concluded that the RAD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, per *Dunsmuir*.

VII. Certified question

[28] Neither party proposed a question to certify and in my view none arises.

VIII. Conclusions

[29] Therefore, with respect, judicial review must be dismissed. No question will be certified.

JUDGMENT

THIS COURT ORDERS that judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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