

Federal Court



Cour fédérale

Date: 20170421

Docket: IMM-4216-16

Citation: 2017 FC 388

Ottawa, Ontario, April 21, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**XIU MEI LIANG
a.k.a. XIUMEI LIANG**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Xiu Mei Liang seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD dismissed Ms. Liang's appeal of a decision of the Refugee Protection Division [RPD] of the IRB, and confirmed that she is neither

a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[1] For the reasons that follow, I have concluded that the RAD reasonably drew an adverse inference from Ms. Liang's failure to respond to new evidence adduced by the Minister on appeal. The grounds upon which the RAD rejected Ms. Liang's account of her departure from China were not so distinct as to require formal notice, and did not give rise to a breach of procedural fairness. The application for judicial review is therefore dismissed.

II. Background

[2] Ms. Liang is a citizen of China. She moved to Peru in 1999. She subsequently married and obtained permanent resident status in Peru. The couple had two children, both of whom are Peruvian citizens. Ms. Liang alleges that her husband began abusing her in January 2013, and they divorced months later. She says that her former husband was given custody of the children, and refused to allow her to visit them.

[3] On September 22, 2014, Ms. Liang returned to China. She claims that she was suffering from depression, and began attending religious services at a Christian "house church". She says that on November 21, 2014, she was apprehended by the Chinese Public Security Bureau [PSB] while distributing religious propaganda in a park, and was detained for two days. Fearing further detention, she hired a smuggler to help her flee China.

[4] Ms. Liang arrived in the United States of America on December 14, 2014. She worked in Los Angeles as a caregiver for approximately six months before entering Canada illegally on June 21, 2015. She did not make a refugee claim until October 15, 2015. Ms. Liang says that she fears persecution in China because of her religious practices, and she fears persecution in Peru because of her former husband.

[5] Ms. Liang's refugee claim was heard by the RPD on December 9, 2015 and February 22, 2016. The RPD dismissed the claim on May 31, 2016.

[6] The Minister of Citizenship and Immigration [Minister] intervened in the hearing before the RPD to argue that: (a) Ms. Liang could return to Peru, where she had permanent resident status; and (b) Ms. Liang's alleged subjective fears of persecution were not credible due to serious inconsistencies in her evidence, including her Basis of Claim form, her refugee intake interview, and her account of her actions.

[7] The RPD found Ms. Liang's testimony to be "vague and inconsistent", and provided the following examples:

- (a) Ms. Liang's explanation of how she was able to leave China without being identified or stopped by the PSB was unreasonable and contrary to objective country condition evidence;
- (b) Ms. Liang's explanation for her failure to make a claim for refugee status in the United States was unreasonable;

- (c) by entering Canada illegally and failing to make a claim for refugee status at the airport in Vancouver, waiting instead until she arrived in Toronto, Ms. Liang undermined the credibility of her fear of persecution in China;
- (d) Ms. Liang's choice of waiting for her parents to pay her smuggler additional funds rather than making a claim for refugee protection was unreasonable; and
- (e) several documents provided by Ms. Liang to support her application for refugee status were not genuine.

[8] The RPD also doubted the credibility of Ms. Liang's claim to be a practising Christian. Even if Ms. Liang were a Christian, the RPD was satisfied that the practice of her particular form of religion would not be prohibited in China.

[9] The RPD concluded as follows:

[76] Having considered all of the evidence, the panel finds that there is not a serious possibility of persecution on a Convention ground should the claimant return to the People's Republic of China, or that, on a balance of probabilities, she 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.

[77] The panel finds that the claimant is not a Convention refugee or a person in need of protection. Therefore, her claim is rejected.

III. Decision under Review

[10] Ms. Liang appealed the RPD's decision to the RAD. The RAD confirmed the decision of the RPD and dismissed her appeal on September 13, 2016.

[11] Ms. Liang did not offer new evidence on appeal. However, the Minister adduced additional documentation that had not been before the RPD: a “Tier 3 FCC” report and information pertaining to the application for a U.S. travel visa that Ms. Liang submitted while she was still in Peru. The RAD found both of these documents to be credible, as they originated from the Government of the United States. The RAD observed that the documents were “very relevant and [...] material.”

[12] The RAD held that information contained in Ms. Liang’s application for a U.S. travel visa contradicted her claim that she was divorced from her husband, a central component of her refugee claim. The RAD drew an adverse inference from Ms. Liang’s failure to respond to the new evidence adduced by the Minister on appeal:

[21] According to the Appellant’s testimony and to her BOC form, she divorced her husband in May of 2013. The problem arises when I view the Minister’s evidence, which shows clearly that the date of the visa application was January 20, 2014, eight months after the Appellant’s alleged divorce (which led to her distress which in turn led to her activity in an illegal home Church in China), and in that application, it clearly indicates that the Appellant was, on January 20, 2014, still married to Li, Da Rong and still living at the same address as he was living. This is a major contradiction which goes to the very core of the claim/appeal. The Minister notified the Appellant through her Counsel by facsimile on July 25; however, no response has been received at the Board as of September 1, 2016 which is long past the deadline for a response to the Minister’s intervention. As no response to the Minister’s evidence and submissions has been tendered, I can only presume that the Appellant is not contesting, nor explaining the major contradiction noted above.

[22] The Minister’s evidence clearly undermines the Appellant’s credibility. [...]

[13] The RAD disagreed with some of the RPD's analysis of the circumstances in which Ms. Liang left China, but also found this aspect of her testimony to lack credibility:

[22] [...] A second major credibility concern occurs in the Appellant's testimony, both written and oral, that she required the assistance of a smuggler to get her out of China and into the USA and eventually into Canada. The Minister's evidence clearly shows that the Appellant had intended to leave China via the USA when she applied for the USA visa almost a year before she allegedly used a smuggler to flee China. The Appellant left China on her own valid passport on December 15, 2014. In her Memorandum of Appeal, the Appellant explains to me that her departure from China occurred nine days or so before she became a person "wanted" by the Public Security Bureau (PSB). The Appellant legally flew out of China and with her US visa in hand, which had been issued over 11 months earlier; she legally entered the USA. As the Appellant was not a "wanted person" in China according to her own submissions and she had all the necessary legal documentation in order to travel to the USA, it makes no sense that she would pay a smuggler to get her from China to Canada when she had legal access to the USA without a smuggler. I concur with the Appellant that the RPD erred in its assessment of the Appellant's departure from China; however, I also concur with the Minister in his submission that the Tier 3 FCC report shows that the Appellant has misrepresented herself to Canadian authorities and is therefore not credible.

[14] The RAD acknowledged that failing to claim refugee protection in the first available country is not a determining factor, nor is delay in claiming protection. According to the RAD, if Ms. Liang were credible, then her explanations would likely be acceptable. However, the RAD found that Ms. Liang was not credible, and dismissed her appeal.

IV. Issues

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

- A. Did the RAD reasonably draw an adverse inference from Ms. Liang's failure to respond to the new evidence adduced by the Minister on appeal?
- B. Did the RAD deny Ms. Liang procedural fairness by rejecting her credibility on different grounds than the ones relied on by the RPD, and without providing adequate notice?
- C. Should a question be certified for appeal?

V. Analysis

[16] The RAD's assessment of the evidentiary record involves questions of mixed fact and law, and is subject to review by this Court against the standard of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]). The Court will intervene only if the decision falls outside the "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).

[17] Questions of procedural fairness are subject to review by this Court against the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

- A. *Did the RAD reasonably draw an adverse inference from Ms. Liang's failure to respond to the new evidence adduced by the Minister on appeal?*

[18] Ms. Liang claimed before the RPD that she divorced her husband in 2013 and fled to China because he was abusive. However, in 2014, she indicated on her application for a U.S

travel visa that she was married and living with her husband in Peru. The U.S. visa application was submitted by the Minister as new evidence on appeal. Ms. Liang was given notice of the Minister's intervention and an opportunity to respond, but she declined to do so. This caused the RAD to state: "As no response to the Minister's evidence and submissions has been tendered, I can only presume that [Ms. Liang] is not contesting, nor explaining the major contradiction noted above."

[19] Ms. Liang complains that the RAD failed to conduct a proper review of the RPD's decision, relying instead on its own credibility findings. In particular, Ms. Liang says the RAD failed to consider "the large number of supporting documents wrongfully ignored by the RPD", including her divorce certificate. She says the RAD was obliged to conduct a full fact-based review of all of the evidence (citing *Huruglica*), and wrongly accepted the RPD's credibility findings based on the RAD's "own (questionable) findings in other areas of the claim" (citing *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at paras 20-21; *Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 at paras 24-25).

[20] Ms. Liang also argues that the RAD cannot draw determinative negative inferences against refugee claimants for misrepresenting themselves while escaping persecution (citing *Lubana v Canada (Citizenship and Immigration)*, 2003 FCT 116 at para 11 [*Lubana*]; *Bagire v Canada (Citizenship and Immigration)*, 2013 FC 816 at paras 20-21 [*Bagire*]).

[21] The Minister responds that it was open to the RAD to find that the contradiction in the evidence regarding Ms. Liang's marital status undermined her credibility, and was fatal to her

claim for refugee protection. According to the Minister, if Ms. Liang had responded to the RAD's request for submissions concerning the contradiction, then she may have been able to persuade the RAD of her honesty (citing *Poudel v Canada (Citizenship and Immigration)*, 2016 FC 978 at para 8 [*Poudel*]). She was given more than a month in which to respond to the Minister's new evidence, but failed to do so. The Minister notes that Ms. Liang was represented by counsel, and says that her silence should therefore be regarded as a strategic choice.

[22] An adverse credibility finding may in itself be sufficient to deny a refugee claim (*Hussain v Canada (Citizenship and Immigration)*, 2004 FC 1186 at paras 10-11; *Amiryar v Canada (Citizenship and Immigration)*, 2016 FC 1023 at paras 19-20). In this case, Ms. Liang was given notice of the Minister's concern regarding the contradictory statements she had made regarding her marital status. She declined to provide an explanation. In these circumstances, I am satisfied that it was open to the RAD to conclude that she had no explanation to offer and to draw an adverse inference.

[23] Some forms of misrepresentation that are not central to a refugee claim, such as the use of fraudulent documents in *Lubana*, may be insufficient to undermine a claimant's credibility. However, in this case, the misrepresentation concerned Ms. Liang's alleged marital problems, which were at the core of her refugee claim. They were said to be the cause of her subjective fear of persecution in Peru, and the reason she turned to religion in China. Her religious practices were said to be the cause of her subjective fear of persecution in China.

[24] While the RAD may have resorted to a “shortcut” by dispensing with a detailed consideration of the documentary evidence, a single adverse credibility finding regarding a core element of a refugee claim may be sufficient to dispose of it. The RAD’s rejection of Ms. Liang’s claim on this basis was therefore reasonable.

B. *Did the RAD deny Ms. Liang procedural fairness by rejecting her credibility on different grounds than the ones relied on by the RPD, and without providing adequate notice?*

[25] The RAD found Ms. Liang’s allegation that she used a smuggler to leave China to be inconsistent with her statement that she was not yet “wanted” by the PSB at the time of her departure. Ms. Liang says that it was “entirely reasonable for her to hire a smuggler to leave China, as when she was still in China she could not know for certain whether she would be stopped by border officials when trying to leave.” She argues that the RAD had a duty to ensure that issues that could have a determinative impact on her appeal were raised in a hearing. The RPD did not focus on Ms. Liang’s assertion that she used a smuggler to leave China despite not being “wanted” by the PSB, and she therefore maintains that the RAD’s failure to provide her with notice and an opportunity to address this matter resulted in a breach of procedural fairness (citing *Sarker v Canada (Citizenship and Immigration)*, 2014 FC 1168 at para 19; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71).

[26] Both parties struggled to make sense of the RAD’s statement that “the RPD erred in its assessment of the Appellant’s departure from China.” The RAD found that “the Appellant had intended to leave China via the USA when she applied for the USA visa almost a year before she allegedly used a smuggler to flee China.” In fact, Ms. Liang sought a U.S. visa in order to return

to China from Peru, which involved transiting through the United States. The visa was still valid when she left China.

[27] It is therefore unclear why the RAD found that the RPD had misapprehended the circumstances of Ms. Liang's departure from China. The RPD appears to have understood that the alleged summons was issued only after her departure. It nevertheless concluded that if Ms. Liang were genuinely sought by the PSB, then she would have been identified in China's "Golden Shield" border control database – perhaps due to her previous detention.

[28] The Minister nevertheless maintains that the RAD reasonably rejected the credibility of Ms. Liang's account of her departure from China because: (a) the PSB had not yet issued a warrant for Ms. Liang's arrest; (b) she was in possession of a valid U.S. travel visa; and (c) she entered the U.S. legally with all of the required documentation.

[29] The manner in which Ms. Liang left China and entered the United States was a central issue before the RPD. The RAD's approach to this issue differed in minor respects from the one taken by the RPD, but the two tribunals arrived at the same conclusion: Ms. Liang's account of her departure from China was not credible. I am not persuaded that the grounds upon which the RAD rejected Ms. Liang's account were so distinct as to require formal notice. The RAD's analysis did not therefore give rise to a breach of procedural fairness.

C. *Should a question be certified for appeal?*

[30] Neither party proposed that a question be certified for appeal. However, in the course of argument, the parties adopted markedly different positions on whether it is open to the RAD to draw an adverse inference from a claimant's failure to respond to a notice of intervention of the Minister pursuant to Rule 4 of the *Refugee Appeal Division Rules*, SOR/2012-257. The Rules are silent regarding the consequences of failing to respond to such a notice.

[31] In my view, the circumstances in which the RAD may draw an adverse inference from a failure of a party to challenge another party's evidence are sufficiently canvassed in existing jurisprudence (see, for example, *Poudel* and *Bagire*). I am therefore satisfied that no serious question of general importance arises in this case.

VI. Conclusion

[32] The application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT

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

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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