

Federal Court



Cour fédérale

Date: 20180618

Docket: IMM-4577-17

Citation: 2018 FC 627

Ottawa, Ontario, June 18, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

**XIAOQUN HE
GAOJUN YANG
NIANLEI YANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mrs. Xiaoqun He, along with her husband and daughter, seek judicial review of a decision of the Refugee Appeal Division [RAD] dismissing their appeal from a decision of the Refugee Protection Division [RPD]. Both tribunals rejected the Applicants' refugee claim on the basis of adverse credibility findings. The Applicants challenge the RAD's decision as being

procedurally unfair for raising a new issue on appeal without notice. The Applicants also submit that the RAD made unreasonable credibility findings.

II. Facts

[2] The Applicants are Chinese citizens seeking refugee status on the basis of Mrs. He's fear of persecution in China, as a result of her Christian faith and membership in an underground house church. Mrs. He states that she joined an underground house church in August 2015 on the encouragement of her friend. On September 27, 2016, Mrs. He's church was raided by the Public Security Bureau [PSB] and she was arrested, along with seven others. The congregants were detained and held overnight. When released, the PSB provided Mrs. He with a penalty decision that prohibited her from leaving her original residing place and required her cooperation on any further investigation. A week after being released from detention, Mrs. He was fired from her job because of her involvement with the underground house church.

[3] Shortly thereafter, Mrs. He and her husband contacted a smuggler to get their family out of the country. On December 14, 2016, the Applicants left China on a flight directly to Canada using their own passports. The same day, the PSB issued a public security summons for Mrs. He for the purpose of attending an interrogation.

[4] The Applicants made a refugee claim, which was rejected in April 2017. The RPD made a number of adverse credibility findings: (a) Mrs. He's motivation for joining an underground church was not credible; (b) nor was her behaviour in China after her arrest; (c) nor was her departure from China using her own passport. On the basis of these specific findings, the RPD

found Mrs. He to be generally without credibility, and was thus unable to assign any evidentiary weight to her testimony.

[5] The RPD also considered the documentary evidence provided by the Applicants and stated that:

[34] ... The adverse credibility finding rendered above, coupled with the objective country documentation material which indicates that fraudulent documents are widespread in China, leads me to conclude that I should assign little evidentiary weight to the documents going to the claimants' allegations of persecution, such as a purported summons, and employment termination letter. The Panel is guided in this assessment by the decision in *Huang v. Canada (Citizenship and Immigration)* [2011 FC 288] and the authorities cited therein; a claimant's "overall credibility may affect the weight given to the documentary evidence." At any rate, the summons and the termination letter presented by the claimants are simple letters in black and white with a simple red ink stamp that can easily be reproduced in a fraudulent manner. I am not prepared to assign them any more than a low evidentiary rate due to their lack of reliability derived from the ease of their reproduction and in the absence of credible testimony. They are insufficient on their own or together to overcome the adverse credibility findings.

[6] The RPD concluded that Mrs. He's Christian faith and church attendance in Canada could not support a *sur place* claim, because Christianity is not *per se* illegal in China. The RPD held that there was no credible evidence that Mrs. He and her family would face persecution in China on the basis of Mrs. He's religious activities in Canada.

III. Impugned Decision

[7] The main issue before the RAD was whether the RPD made unsustainable credibility findings. While the RAD also concluded that Mrs. He was generally not credible, its rationale for

doing so focused on its conclusion that Mrs. He submitted fraudulent documents to support her case. Specifically, the RAD challenged the authenticity of the summons and the penalty decision.

[8] The RAD identified three differences between the summons submitted by Mrs. He and the sample summons in the National Documentation Package [NDP] for China. As a result of these differences, the RAD concluded, on a balance of probabilities, that the summons was fraudulent. It drew a negative credibility inference from this finding.

[9] Similarly, the RAD found the penalty decision to be fraudulent, also based on noted differences between Mrs. He's documents and information found in the NDP. These two findings led the RAD to conclude, on a balance of probabilities, that Mrs. He's letter of dismissal was also fraudulent.

[10] As a result, the RAD concluded that Mrs. He was not credible, nor was her allegation of being sought by the PSB for her religious practices.

[11] The RAD then reviewed the rest of the RPD's findings and the Applicants' submissions, "using this very important determinative factor above as a guide."

[12] The RAD acknowledged that Mrs. He's inconsistent testimony raised the issue of credibility but did not agree with the RPD that Mrs. He's motivation for joining an underground house church or her behaviour after her arrest lacked credibility. However, the RAD's conclusion on this latter point seems to be based on its belief that Mrs. He was not wanted by the

PSB for her religious activities. According to the RAD's analysis, Mrs. He would have had nothing to fear in going to acquire a temporary Resident Identity Card from the PSB station two days after her alleged arrest, since she was never arrested, detained or provided with a penalty decision.

[13] For the RAD, the issue of the Applicants' exit from China on their own passports was moot. Since Mrs. He submitted fraudulent documents as evidence of her arrest, she was never actually wanted by the Chinese authorities for her religious practices. This explains why she and her family had no problem leaving China using their own documentation.

[14] The RAD agreed that the alleged summons, found fraudulent, was issued after the Applicants left China, and that the RPD's finding on this issue was in error. I note, however, that the RPD did not reach any conclusion justifying the RAD's disagreement on this point. The RPD did not say that the Applicants' departure from China was not credible because there was a summons for Mrs. He at the time of her departure. Rather, the RPD stated that:

[21] ... Under Article 12 of the *Exit and Entry Administration Law of China*, exit from the country is denied under certain circumstances, including instances where the citizen does not hold valid exit documents, or is a suspect or defendant in a criminal case. I find that the female claimant's alleged situation would fit within those circumstances where denial of exit from China may be exercised. Specifically, the claimant testified that when she was arrested, the police took her RIC [Resident Identity Card] and registered her data in a notebook before returning the card to her. I find that this indicates that the PSB made a note of her alleged violations which would have been updated on China's vast database about its citizenry.

[15] The RPD's finding that Mrs. He's departure from China under her own passport was not credible was made on the basis of Mrs. He's alleged arrest and the penalty decision, which forbade her from leaving her original residing place. It was not based on the existence of the summons.

[16] Finally, with regard to Mrs. He's belief in Christianity, the RAD concurred with the RPD that Christianity is not illegal in China and that there was no probative evidence that Mrs. He would be sought by the PSB upon returning to her country. Thus, Mrs. He's religious beliefs and her attendance at church in Canada were not considered a detriment to her returning to China.

IV. Issues and Standard of Review

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

- A. *Did the RAD breach procedural fairness?*
- B. *Did the RAD err in making its credibility findings?*

[18] The procedural fairness issue will be reviewed on the correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 9) and the RAD's credibility findings will be reviewed on the reasonableness standard (*Oluwaseyi Adeoye*, above at para 8; *Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 at para 24; *Ahmed v Canada (Citizenship and Immigration)*, 2016 FC 763 at para 14).

[19] The reasonableness standard requires that this Court determine whether the RAD's decision falls 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).

V. Analysis

A. *Did the RAD breach procedural fairness?*

[20] I do not believe that the RAD breached procedural fairness by raising the issue of the penalty decision's authenticity. Contrary to the Applicants' allegations, both the existence of the penalty decision, as well as its contents, were referenced in the RPD's reasons numerous times. The penalty decision's edict forbidding Mrs. He from leaving her "original residing place" was central to the RPD's finding that her departure from China under her own passport was not credible.

[21] Furthermore, the RPD stated that the "totality of the claimants' documentary disclosure" was considered and "fraudulent documents are widespread in China." These references should have prepared the Applicants to address the contents and the authenticity of their documents before the RAD. I find Justice Paul Favel's comments from the *Oluwaseyi Adeoye* decision, above, to be equally applicable in this case:

[13] In this case, the RAD did not raise a new issue on appeal because the Applicant's credibility was already at issue before the RPD. There is no procedural fairness issue when the RAD finds an additional basis to question the Applicant's credibility using the evidentiary record before the RPD. The Applicant was already on notice that credibility was a live issue based on the RPD's original decision.

[Citation omitted.]

B. *Did the RAD err in making its credibility findings?*

[22] In my opinion, the RAD's credibility findings are reasonable. The RAD based its credibility findings on its assessment that the summons and the penalty decision were fraudulent. These conclusions are justified, transparent and intelligible. The RAD provided three separate reasons to justify its conclusions on both the summons and the penalty decision's inauthenticity, over and above its reference to the NDP indicating that fraudulent documents are widespread in China.

[23] I do not agree that the RAD's conclusions on the summons and the penalty decision's authenticity are speculative or microscopic. I believe that the RAD is the expert in these matters, and that its conclusions are owed deference.

[24] The Applicants provide the case of *Lin v Canada (Citizenship and Immigration)*, 2012 FC 288, to support their position that the RAD's finding on the summons' inauthenticity is unreasonable because it merely compared the summons at issue with a sample in the NDP and found differences between the two. The *Lin* decision states:

[52] I accept the Applicant's argument that this finding was entirely unreasonable. RIR CHN42444.E, which the RPD relied upon, dated from June 2004. It is highly unlikely that this document could be a reliable authority as to what a Notice issued in 2009 would look like. In any event, RIR CHN42444.E specifies that the example summonses are "samples." The document does not say that these are the only forms of summonses issued by Chinese authorities; nor does it say that the style and content of summonses is uniform throughout China. On the contrary, as the Applicant points out, the document shows that procedural laws are not uniformly implemented in the PRC. ...

[53] Accordingly, based on the information in the RIR, the fact that the Notice is different in certain aspects from the samples attached to the RIR is neither surprising nor suspicious. I agree with the Applicant that the RPD erred by rejecting his Notice on the basis of an overly strict and ultimately misguided interpretation of an outdated document.

[25] However, I find the present case to be distinguishable from the *Lin* case because the RAD explicitly protected itself from being impugned in a similar manner by citing the NDP for China on this very issue: “[T]here has been no variation in the format of summonses and subpoenas since 2003 (ibid. 22 June 2013)”, “such forms are supposed to be used throughout the country” and “regional variations are not meant to exist.”

[26] With regard to the penalty decision’s authenticity, the Applicants have provided an affidavit to establish that the Chinese characters in the decision may have more than one English translation. It is submitted to counter one of three bases upon which the RAD found the penalty decision to be fraudulent: the fact that the English translation of the act referenced in Mrs. He’s penalty decision differs from the English name of the act in the NDP.

[27] However, this affidavit was not before the RAD and the general rule is that a reviewing court must only consider the evidence that was before the administrative decision-maker. None of the few exceptions to that rule apply here, particularly given the above conclusion that the RAD did not breach procedural fairness (*Henri v Canada (Attorney General)*, 2016 FCA 38 at paras 39-41; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20).

[28] I also disagree with the Applicants' position that, "[s]ince Mrs. He was not delivered to a 'house of detention', the RAD found that the Penalty Decision is fake." Respectfully, this was not the conclusion reached by the RAD. The RAD's conclusion on the penalty decision's inauthenticity was based on a textual comparison of the language used in the law with which the penalty decision purports to comply, and the language used in the penalty decision. Finding several discrepancies between the law and the penalty decision, the RAD concluded that the penalty decision was fraudulent.

[29] Additionally, while the RAD found the issue of exiting China to be "moot", I think that the RAD employed a mistaken use of that term. Instead of being moot, the fact that the Applicants were able to depart China on their own passports actually supports the RAD's findings that the summons and the penalty decision were fraudulent and that Mrs. He was never wanted by the PSB for her religious activities. As the RAD indicated: "[I]f the 'Penalty Decision' was genuine, the Appellant would reasonably have been entered into the PSB database." The unstated presumption is that if the penalty decision was genuine and Mrs. He was actually sought by the PSB, she and her family could not have so easily departed China using their own passports, as they did.

[30] The RAD and the RPD each dismissed the Applicants' claim for adverse credibility reasons. The RAD's reasons are not exactly the same as those of the RPD, but I believe that both sets of reasons are complementary. The RAD's only true disagreement with the RPD is that it found Mrs. He's motivation for joining an underground house church to be credible. In all other respects, the RAD upheld the conclusions of the RPD. Mrs. He's testimony and her

corroborative documentary evidence were given little to no evidentiary weight by the RPD and the RAD. Both panels concluded that there was no probative evidence that Mrs. He was ever sought by the PSB for her religious activities, nor was there any probative evidence that she would face persecution for her religious beliefs upon returning to China.

VI. Conclusion

[31] For the reasons given above, this application for judicial review is dismissed. The parties have proposed no question of general importance for certification and none arises from the present case.

JUDGMENT in IMM-4577-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. No question of general importance is certified.

“Jocelyne Gagné”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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