

Federal Court



Cour fédérale

**Date: 20190118**

**Docket: IMM-1949-18**

**Citation: 2019 FC 75**

**Ottawa, Ontario, January 18, 2019**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**CANXIONG SU  
YANXIA CAO  
HUILIN SU  
ESTEFANIA VERONICA SU CAO  
JENNIFER STELLA SU CAO (A MINOR)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicants, Canxiong Su, his wife Yanxia Cao, and their eldest daughter Huilin Su are citizens of China who fear persecution based on their practice of Falun Gong. Mr. Su's two other daughters, Estefania Veronica Su Cao, and Jennifer Stella Su Cao are citizens of Peru who

fear returning to Peru because of violence they experienced as ethnic Chinese. The Applicants arrived in Canada on April 16, 2012, and a month or so later claimed refugee protection.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected the Applicants' claims in a decision dated April 5, 2018. They have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], for judicial review of the RPD's decision. They ask the Court to quash the decision and return the matter for redetermination by another member of the RPD.

#### I. Background

[3] In 1991, Mr. Su moved from China to Peru where he obtained permanent resident status in 1994. He opened a restaurant in 1998 and applied for his wife and eldest daughter (at the time his only daughter) to join him in Peru. His wife and eldest daughter were granted Peruvian permanent resident status in 2000. His two younger daughters were subsequently born in Peru.

[4] Mr. Su and his wife started practising Falun Gong in the summer of 2010 after he returned from a three-month holiday in China where he met an old friend who claimed the practice of Falun Gong could help him with his mental and physical health. Upon his return to Peru, Mr. Su introduced his wife to the practice of Falun Gong.

[5] Between 2006 to 2012, Mr. Su's restaurant was robbed six times, and one time a deliveryman was robbed. The police never provided protection from this violence, although it was requested by Mr. Su. On one occasion the police asked for money or free food. In 2010, Mr.

Su started to pay “protection fees” to gangsters, and by October 2011 the monthly amount of the fees had increased to \$2,000.

[6] The last robbery occurred on November 8, 2011, when three men armed with guns and knives arrived at the restaurant. They hit Mr. Su on his forehead with a gun, robbed the restaurant, broke a window, and threatened to kidnap his daughters if he did not pay for protection. The gangsters threatened Mr. Su that if he reported the incident to police, they would not guarantee his or his wife’s safety.

[7] Mr. Su and his wife believed the police would not help them and, due to the escalating violence, they decided to sell the restaurant and leave the country. In February 2012, a buyer for the restaurant was found, and the sale was set to close in April 2012. The Applicants travelled to China in March 2012 and planned to return to Peru to close the sale of the restaurant.

[8] While in China, Mr. Su and his wife attended a Falun Gong practice session each week. The Chinese Public Security Bureau [PSB] discovered their Falun Gong practice group on April 12, 2012. Mr. Su and his wife were not present at the time of the raid but learned later that some of the practitioners may have been arrested by the PSB. They decided to leave China immediately and travelled to Canada, arriving on April 16, 2012.

[9] After arriving in Canada, the Applicants learned that fellow Falun Gong practitioners in China had been arrested and they had given Mr. Su’s and Ms. Cao’s names to the Chinese

authorities. The Applicants decided to make refugee claims in Canada after realizing they could not return to China and did not want to return to the dangerous situation in Peru.

## II. The RPD's Decision

[10] After summarizing the Applicants' allegations and confirming their identities, the RPD stated that the issue of exclusion was raised because Mr. Su, his wife, and eldest daughter held Peruvian permanent residence status before coming to Canada. The RPD referenced Section 98 of the *IRPA* and Article 1E of the *United Nations Convention on the Status of Refugees*, noting that these provisions provide that surrogate protection is not to be extended to a person who already has rights and obligations as a resident in a third country.

[11] The RPD also referenced the test for Article 1E determinations stated in the Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118,

[2011] 4 FCR 3 [*Zeng*]:

[28] Considering all relevant factors to the date of the hearing, does the claimant have status, substantially similar to that of its nationals, in the third country? If the answer is yes, the claimant is excluded. If the answer is no, the next question is whether the claimant previously had such status and lost it, or had access to such status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors. These include, but are not limited to, the reason for the loss of status (voluntary or involuntary), whether the claimant could return to the third country, the risk the claimant would face in the home country, Canada's international obligations, and any other relevant facts.

[12] In view of this test, the RPD found that the answer to the first prong of the test was likely "no". In the RPD's view, while Mr. Su, his wife, and their eldest daughter might not have status

in Peru substantially similar to that of Peruvian nationals, the answer to the second prong of the test was definitely “yes”. The RPD concluded that Mr. Su, his wife, and their eldest daughter did have such status but had lost it by operation of law since they had been outside of Peru for more than 365 days without authorisation. The RPD noted there was no evidence to indicate that Mr. Su, his wife, and their eldest daughter had obtained authorisation to remain outside Peru.

[13] The RPD then proceeded to consider and balance the various factors noted in *Zeng*. It considered Mr. Su’s testimony about the circumstances under which the Applicants had come to Canada, noting that they were supposed to return to Peru but changed their travel itinerary to come to Canada. The RPD noted that Mr. Su’s friend had telephoned him at the same time as the PSB raid, and that the Applicants had left China the very next day. The RPD found:

... the sequence of events somewhat convenient. In the panel’s view, the principal claimant’s statement that his friend telephoned him, at a time that was contemporaneous with the PSB raid, and told him that three fellow practitioners had named him as a practitioner of Falun Gong, stretches the bounds of common sense. In the panel’s view, the principal claimant’s friend could not know that he, the principal claimant, had been named as a practitioner and not himself been charged as he would have had to been on the scene to know this specific information. In the panel’s view there is valid reason to doubt and reject this aspect of the principal claimant’s testimony.

[14] After assessing the involvement of a snakehead engaged by Mr. Su and noting that the Applicants had obtained visas for the United States prior to leaving Peru, the RPD found it more likely than not that when they went to China, they had no intention to return to Peru. In the RPD’s view, because Mr. Su, his wife and their eldest daughter could have returned to Peru but elected not to, their loss of residency status was entirely voluntary; and since they had remained

in Peru for more than six years after the first robbery, that worked against their subjective fear of persecution in Peru.

[15] The RPD next considered the risk faced by Mr. Su in China. The RPD questioned Mr. Su about the law of Fa and his practice of Falun Gong before and after coming to Canada. In the RPD's view, Mr. Su responded in generalities and his knowledge of Falun Gong principles was not in keeping with what might reasonably be expected of an experienced practitioner. The RPD acknowledged that, while not all practitioners would have the same sophisticated level of knowledge, Mr. Su's period of study of at least six years meant more was expected of him. The RPD concluded Mr. Su had not been a genuine practitioner of Falun Gong while in China or in Canada.

[16] The RPD noted that Mr. Su's wife had testified that she practiced Falun Gong and was afraid of being arrested should she be returned to China, and that her eldest daughter had the same fear. The RPD was not persuaded that Mr. Su's wife or his eldest daughter were genuine practitioners of Falun Gong, and therefore concluded that they would not be at risk of persecution in China.

[17] As for Mr. Su's two youngest daughters, the RPD acknowledged that they were citizens of Peru and claimed to have a well-founded fear of persecution from criminals in Peru by reason of their Chinese ethnicity. The RPD was not persuaded though that there was any reliable evidence, specific to the two youngest daughters, which could establish that they were at risk of

persecution in Peru because of their ethnicity. As a result, the RPD found that the onus to establish risk of persecution in Peru had not been met in their cases.

### III. Analysis

[18] This application for judicial review raises one primary issue: that is, was the RPD's decision reasonable?

#### A. *Standard of Review*

[19] The RPD's assessment of the Applicants' credibility and the evidence as well as its decision overall is to be reviewed on a standard of reasonableness with considerable deference owed to the advantageous position of the trier of fact (*Cambara v Canada (Citizenship and Immigration)*, 2017 FC 1019 at para 13, 286 ACWS (3d) 531; *Aguebor v (Canada) Minister of Employment and Immigration*, [1993] FCJ No 732 at para 4, 160 NR 315).

[20] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the 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, [2008] 1 SCR 190). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and*

*Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

B. *The Applicants' Submissions*

[21] The Applicants contest the RPD's finding that they left Peru on a voluntary basis because they remained for more than six years after the first robbery, and that this undermined their subjective fear of persecution in Peru. In their view, the RPD did not consider any of their specific allegations about the violence, harassment, and crime they experienced as Chinese business owners in Peru; nor did it consider their allegations of a lack of state protection. The Applicants say the RPD's reasons are deficient because a claimant's delay in making a claim, while relevant, will not usually be a decisive factor in itself.

[22] According to the Applicants, the RPD's consideration of the risk faced by Mr. Su's two youngest daughters in Peru was not reasonable. They disagree with the finding that there was no reliable evidence to support their fear. The Applicants point to Mr. Su's sworn testimony in his narrative - that they were targeted because of their Chinese ethnicity and regarded as foreigners in Peru - and this should have been taken more seriously by the RPD. In the Applicants' view, the RPD ignored evidence that Mr. Su's two youngest daughters would face gender-based violence in view of the general country conditions in Peru.

[23] The Applicants say the RPD unreasonably assessed Mr. Su's credibility by focusing exclusively on his level of knowledge about the practice of Falun Gong. According to the Applicants, Mr. Su's testimony about Falun Gong was credible, accurate, and consistent with



Falun Gong text. The Applicants note that the RPD did not identify any errors and did not state the types of responses that a person who had been practising Falun Gong since 2010 would be expected to give.

C. *The Respondent's Submissions*

[24] The Respondent disagrees with the Applicants' statement that a claimant's delay in making a claim, while relevant, will not usually be a decisive factor in itself. According to the Respondent, this ignores jurisprudence which has established that a claimant's delay can indeed be indicative of a lack of subjective fear in some cases.

[25] In the Respondent's view, the only allegation of risk was that there were criminals and terrorists in Peru and Mr. Su's two youngest daughters would be subject to extortion and fear for their lives. Given the testimony and evidence, the Respondent says it was open to the RPD to find there was no reliable evidence put before it specific to Mr. Su's two youngest daughters establishing any risk to them in Peru based on their ethnicity. According to the Respondent, the RPD did not err by ignoring evidence about gender-based violence as this was raised only in the Applicants' post-hearing submissions and not raised in their claim forms or during the hearing.

[26] The Respondent says the credibility finding against Mr. Su was not exclusively based on his knowledge of Falun Gong, but also on the Applicants' departure from China not being credible, the timeline of events regarding the PSB raid, and that there had been pre-planning by obtaining a US visa which would be unnecessary if they were returning to Peru. In the Respondent's view, the RPD properly tested Mr. Su's knowledge and reasonably found he was

not a genuine Falun Gong practitioner because, despite attending weekly meetings for over six years, he was unable to provide detailed answers to the RPD's questions.

D. *The RPD's Decision is Reasonable*

[27] I agree with the Respondent that the credibility finding against Mr. Su was not exclusively based on his knowledge of Falun Gong, but on other factors as well; notably, the Applicants' departure from China not being credible, the timeline of events regarding the PSB raid, and that there had been pre-planning by obtaining a US visa which would be unnecessary if they were returning to Peru.

[28] I disagree with the Applicant that the RPD ignored evidence that Mr. Su's two youngest daughters would face gender-based violence in Peru. The evidence as to their risk in this regard was not personalized to their particular situation but was only general country conditions evidence. There was no testimony on this issue at the hearing and no information was provided in the personal information forms. It is not unreasonable for the RPD to choose not to address an issue raised in a cursory manner in port-hearing submissions.

[29] Although I agree with the Applicants that a claimant's delay in making a claim, while relevant, will not usually be a decisive factor in itself, it was not unreasonable for the RPD to find that remaining in Peru for more than six years after the first robbery worked against their subjective fear of persecution. This delay was not the reason why the RPD rejected the Applicants' claims. Rather, the RPD found that Mr. Su, his wife and eldest daughter were excluded from refugee protection in Canada because they had voluntarily lost their status in Peru

and they faced no risk of persecution in China because they were not genuine Falun Gong practitioners.

IV. Conclusion

[30] The RPD's reasons for rejecting the Applicants' claims for refugee protection are intelligible, transparent, and justifiable, and its decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicants' application for judicial review is therefore dismissed.

[31] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

**JUDGMENT in IMM-1949-18**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is dismissed,  
and no serious question of general importance is certified.

"Keith M. Boswell"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1949-18

**STYLE OF CAUSE:** CANXIONG SU, YANXIA CAO, HUILIN SU,  
ESTEFANIA VERONICA SU CAO, JENNIFER STELLA  
SU CAO (A MINOR) v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 8, 2018

**JUDGMENT AND REASONS:** BOSWELL J.

**DATED:** JANUARY 18, 2019

**APPEARANCES:**

Michael Korman FOR THE APPLICANTS

Leila Jawando FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Korman & Korman LLP FOR THE APPLICANTS  
Barrister and Solicitor  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario