

Federal Court



Cour fédérale

Date: 20190205

Docket: IMM-2022-18

Citation: 2019 FC 148

Ottawa, Ontario, February 5, 2019

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

**SHAOQIAN HUANG
HUIZHEN SU
JUHUI HUANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Shaoqian Huang, his wife Ms. Huizhen Su, and their son Juhui Huang are citizens of China. They disagree with the determination of the Refugee Protection Division [RPD] rejecting their refugee claims on the grounds that they have not credibly established that they risk

persecution or cruel and unusual treatment for engaging in anti-government demonstrations in their home village.

II. Facts

[2] Mr. Huang operated a fish farm at a fish pond he leased in 2006 from the municipality.

[3] On January 12, 2012, he received a notice from the district government advising him that the land would be “expropriated” – or rather that the lease would be terminated, in order to build a freight distribution centre. He, along with 26 other businesses in the village, was ordered to vacate the expropriated lands by the end of March 2012.

[4] In his narrative, he explains that he was offered insufficient cash compensation, with no relocation compensation or arrangements. He was appointed as one of the six representatives of the affected villagers who attempted to express their concerns to the district government several times, but to no avail. The district authorities informed them that they would not change their decision and that the villagers had to vacate the land. If they refused, they would be removed by force.

[5] On February 21, 2012, approximately 50 villagers protested in front of the district government building. According to the Applicants' narrative, the protesters held banners and yelled slogans saying that the government was corrupt and that the compensation was unfair.

[6] The next day, approximately 90 villagers returned to protest. However, Public Security Bureau [PSB] officers arrived on the scene and assaulted the protesters to disperse them. There were clashes between the protesters and the PSB, but Mr. Huang and his wife managed to escape. They left town and went into hiding at a friend's house.

[7] The next day, Mr. Huang was informed by his parents that the PSB had gone to his house in order to arrest him and his wife. According to his parents, the couple was accused of interfering with and slandering government officials and of illegally gathering around government offices and officers. The PSB also questioned Mr. Huang's son about their whereabouts and threatened him of reprisal if he did not cooperate with them.

[8] Mr. Huang later learned that three representatives and eight villagers were arrested and taken into custody.

[9] As a consequence, the Applicants decided to flee China; they found a snakehead who arranged for them to travel to the United States via Hong Kong, before they illegally crossed the Canadian border.

[10] Mr. Huang alleges that the PSB continues to visit his home, and that some of the representatives and villagers who were arrested are still detained.

III. Impugned Decision

[11] The RPD found that the Applicants had not credibly established that they would face persecution in China. In any event, the persecution that they feared was merely prosecution for having participated in an anti-government demonstration.

[12] The RPD found that the PSB only arrested protesters who were involved in clashes with the authorities, which is not the case for the Applicants.

[13] During his testimony, Mr. Huang stated that two other villagers had escaped to South America after their altercation with the PSB. However, the RPD faults the Applicants for not having mentioned this detail in the Applicants' narrative dated June 2012, nor in the addendum to the narrative provided in September 2017, two weeks before the first day of the RPD hearing. The RPD drew a negative inference from this omission, viewing this fact as central to the Applicants' claim.

[14] The RPD also doubted the Applicants' credibility because they provided no documentary evidence, such as a summons or an arrest warrant, showing that the PSB had in fact visited their home in search for them.

[15] The RPD made a further adverse credibility finding as a result of the Applicants transiting through the United States without requesting asylum in that country. The RPD found that the Applicants had hired a smuggler not to flee from China, but rather to come to Canada. In

its opinion, the Applicants' failure to claim asylum in the United States showed a lack of subjective fear of persecution.

[16] The RPD rejected the Applicants' allegations that they were able to leave China on their own genuine passports while being wanted by the PSB. The Chinese government implemented the Golden Shield Project, a security network with extensive tracking and control mechanisms which would easily allow the authorities to stop the Applicants if they were actively being pursued by the PSB. If the Applicants were truly wanted by the authorities, they would more likely than not have been intercepted at a security check, despite receiving the assistance of a snakehead. The RPD did not find it credible that the smuggler could have allowed the Applicants to bypass all security checks and exit controls in mainland China and Hong Kong.

[17] The RPD found that even if it had accepted that the Applicants were being pursued by the PSB, this did not amount to persecution. Instead, the RPD found that any interest the authorities may have in the Applicants would be to prosecute them for having illegally participated in an anti-government demonstration. In that context, prosecution is not persecution.

IV. Issues

[18] This application for judicial review raises the following questions:

- A. *Was it a breach of procedural fairness and/or natural justice for the RPD Member not to recuse herself?*
- B. *Did the RPD err in its assessment of the Applicants' credibility?*

C. *Did the RPD err in failing to consider that prosecution amounts to persecution in the Applicants' case?*

D. *Did the RPD err in its assessment of the documentary evidence?*

[19] If it is found that the RPD Member was biased, this, in and of itself, would warrant the intervention of the Court. If she was not, her analysis is reviewable under the standard of reasonableness (*Canada (Citizenship and Immigration) v Esfand*, 2015 FC 1190 at para 13).

V. Analysis

A. *Was it a breach of procedural fairness and/or natural justice for the RPD Member not to recuse herself?*

[20] During the RPD hearing, counsel for the Applicants made an oral application for the recusal of the RPD Member. Counsel argued that the Member was biased for having made findings of fact before hearing the entirety of the Applicants' testimony. In particular, she commented that it was "odd" and that "it did not make sense" that the PSB would not leave any documentation during their visits to the Applicants' home. Saying that she did not believe Mr. Huang's testimony raised, according to the Applicants, a reasonable perception of bias.

[21] I do not agree with the Applicants. In my view, they have failed to present more than a vague allegation of bias. The Member's concerns with Mr. Huang's testimony were warranted, and it was open to her to question why the PSB would not leave a summons if a person was in fact wanted. The fact that the Member did not find the Applicants' explanation to be credible is not enough to substantiate allegations of bias.

[22] An informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the decision-maker acted fairly (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369). An allegation of bias must be supported by material evidence (*Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8) and none has been presented to me.

[23] Upon review of the hearing transcript, it is clear that the Member's comments were made in order to elicit evidence from Mr. Huang, and not to make a finding of fact before having heard all of the evidence:

MEMBER: Have they left any documents at your house corroborating that they have been looking for you?

PRINCIPAL CLAIMANT: No

MEMBER: Do they know you are not in China? Does the PSB know that you are not in China?

PRINCIPAL CLAIMANT: Yes, I knew because they found out from my father that I had we had been ... we have came to Canada.

MEMBER: Okay, so you ... you were involved in some protest in 2012, the same year you left China. You have been out of the country for five years and you are telling me that since 2012 until 2017 PSB is still visiting your house looking for you.

PRINCIPAL CLAIMANT: Yes, every year.

MEMBER: I find it odd that they have left no documents, no summons to appear, no arrest warrant, nothing. That does not make sense.

COUNSEL: Well I do not really know. I am just concerned now, because you are saying it does not make sense, so I do not ...

MEMBER: It does not make sense because considering it is a police authority ...

COUNSEL: Okay

MEMBER: And why would there not be ... like I am just asking the claimant.

[...]

COUNSEL: To me ... that that suggest ... that you know, you are not saying, 'can you explain it further', you are saying it does not make sense. To me that is almost a negative finding.

MEMBER: I am just going to say that it does not make sense to me, can you explain why they would not have left any documentation with your parents, which shows that they have been looking for you. Just for them to leave some ... some evidence that they have been there.

COUNSEL: But I ... I am just putting on the record that that might suggest to me that there is already some bias in the Member's mind with respect to the interpretation of country documentation without really hearing the full extent of the claimant's testimony or counsel's submissions.

MEMBER: No the claimant is entitled to explain. I am asking.

COUNSEL: Okay

MEMBER: He is entitled to explain.

[24] In my view, there were no reasons for the RPD Member to recuse herself. It was proper to question Mr. Huang about why there was no documentary evidence that the PSB was seeking to arrest the Applicants. She was trying to make sense of all the evidence before her, including the fact that over five years had elapsed since the Applicants had left China and yet, Mr. Huang's testimony was that although the PSB is still looking for the Applicants, there is no documentary evidence of its persisting efforts.

[25] The Court's intervention is not warranted on this ground.

B. *Did the RPD err in its assessment of the Applicants' credibility?*

(1) Omission from the narrative that two of the representatives fled to South America

[26] While I agree with the Applicants that the fact that two of the villagers' representatives fled to South America is not central to their claim, the fact that they left the country was nevertheless relevant, for instance, to establish a subjective fear of persecution. Given that the Applicants were represented by experienced counsel and amended their narrative less than two weeks before the hearing before the RPD, it was reasonable to expect that this information would be included, especially given that the Applicants gave information on the representatives and villagers who were arrested.

[27] In any event, the RPD did not decide the case on that basis alone, and was allowed to draw a negative inference from the omission. I am not persuaded that this finding was unreasonable.

(2) Lack of summons or arrest warrant

[28] The Applicants argue the RPD unreasonably rejected the claim that the PSB was pursuing them on the sole basis that no summons or arrest warrant was adduced. The jurisprudence is split on whether such a finding is reasonable.

[29] The Applicants acknowledge that a summons may be issued, but that it is not always the case. In *Wang v Canada (Citizenship and Immigration)*, 2018 FC 1124 at paras 39-44, Justice Paul Favel found that when a summons "may" be issued by the PSB, it is unreasonable to determine that a failure to present a summons is so unlikely so as to damage an applicant's

credibility. Holding that a summons would necessarily have been issued is speculative and unreasonable (*Zhang v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 444 at para 16).

[30] On the other hand, when the refugee claimant testifies, as in the present case, that the PSB is relentlessly pursuing him or her, it may be reasonable to expect a summons or some other kind of documentation (*Yan v Canada (Citizenship and Immigration)*, 2018 FC 781 at paras 37-38; *Su v Canada (Citizenship and Immigration)*, 2015 FC 666 at para 16; *Liu v Canada (Citizenship and Immigration)*, 2012 FC 1362 at paras 56-60; *Jia v Canada (Citizenship and Immigration)*, 2012 FC 444 at paras 37-38). Furthermore, the lack of a summons is one of the many reasons why the RPD made a negative credibility finding. Given the general lack of supporting documentation and the RPD's analysis of the other inconsistencies in the Applicants' story, drawing a negative inference due to the absence of a summons was a possible, acceptable outcome (*Sun v Canada (Citizenship and Immigration)*, 2008 FC 1255 at para 13; *Deng v Canada (Citizenship and Immigration)*, 2015 FC 176 at para 14).

[31] In my opinion, given the factual record that a summons is not always issued, it would have been an unreasonable error for the RPD to find that the lack of a summons was determinative. However, this negative credibility finding is made in a context where the RPD disbelieves many other elements in the Applicants' story. In other words, it is clear that the absence of a summons is not determinative, but rather, is made as part of a series of negative inferences which lead to an adverse credibility finding. Therefore, this aspect of the RPD's decision is reasonable.

(3) Failure to seek asylum in the United States

[32] Regarding the Applicants' failure to seek refuge in the United States, the RPD found that it indicated a lack of subjective fear of persecution. Although the RPD specifically noted that this finding was not determinative, I agree with the Applicants that it was an error for the RPD to draw a negative inference from their failure to claim asylum in the United States. The principal Applicant explained at the hearing that he merely followed the smuggler's instructions, who told him that since the United States visas had been obtained through fraudulent misrepresentation, a refugee claim in Canada would have better odds of succeeding.

[33] As there was a good reason given by the Applicant for not claiming asylum in the United States, it was unreasonable for the RPD to draw a negative inference solely from that omission. However, since the RPD itself stated that this finding was not determinative, the error does not go to the heart of the decision and is not grounds to set the decision aside (*Castillo Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 648 at para 24).

(4) Ability to exit from China while being pursued by the PSB

[34] The Applicants submit it was unreasonable for the RPD to disbelieve they were able to leave China on their own passports while being pursued by the PSB. Despite their testimony that they received the assistance of a smuggler who told them to go to a specific security counter, the RPD found it more likely than not that they would have been intercepted at one of the many security checks had they really been wanted by the PSB.

[35] This question and its outcome depend on the precise factual circumstances.

[36] The assistance of a smuggler who has bribed the appropriate person may be sufficient to bypass the Golden Shield system. Some RPD decisions rejecting refugee claims under these circumstances have been found to be unreasonable (*Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 at paras 15-16; *Zhang v Canada (Citizenship and Immigration)*, 2008 FC 533 at para 11; *Sun v Canada (Citizenship and Immigration)*, 2015 FC 387 at para 26; *Yang v Canada (Citizenship and Immigration)*, 2016 FC 543 at paras 11-14; *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 at para 68; *He v Canada (Citizenship and Immigration)*, 2017 FC 1089 at paras 6-11; *Zhang v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 444 at paras 13-15; *Jiang v Canada (Citizenship and Immigration)*, 2019 FC 57 at paras 24-31).

[37] However, other cases have found reasonable the conclusion that refugee claimants could not bypass the Golden Shield system if they were in fact wanted, even with the assistance of a smuggler (*Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 14; *Yan v Canada (Citizenship and Immigration)*, 2017 FC 146 at paras 20-21; *Zeng v Canada (Citizenship and Immigration)*, 2014 FC 1060 at para 32; *Chen v Canada (Citizenship and Immigration)*, 2017 FC 539 at paras 31-32, 36; *Gu v Canada (Citizenship and Immigration)*, 2017 FC 543 at paras 33-35; *Zhu v Canada (Citizenship and Immigration)*, 2017 FC 615 at paras 10, 22-23; *Lin v Canada (Citizenship and Immigration)*, 2017 FC 1175 at paras 34-42; *Yan v Canada (Citizenship and Immigration)*, 2018 FC 781 at paras 9, 29-36; *Li v Canada (Citizenship and Immigration)*, 2018 FC 877 at paras 14-21).

[38] In this particular case, as in *Gong*, supra at para 14, *Chen*, supra at paras 31-32, and *Lin*, supra at para 40, the RPD pointed to the objective country conditions evidence to support its finding that it was unlikely for the Applicants to have been able to exit China, despite having hired a smuggler. This is consistent with Jurisprudential Guide TB6-11632 at paragraphs 32-36 which found unlikely that a wanted refugee claimant could bypass all of the exit controls in place, even with the assistance of a smuggler. I note that, as per the *Policy Note regarding the identification of TB6-11632 as a RAD Jurisprudential Guide*, RPD and RAD members are expected to apply Jurisprudential Guides in cases with similar facts or provide reasoned justifications for not doing so. This increases the consistency, certainty and predictability in the decision-making process (*Jiang v Canada (Citizenship and Immigration)*, 2018 FC 1064 at paras 26-27).

[39] Considering the above, the RPD's finding that it is unlikely the Applicants were wanted by the PSB was reasonable.

C. *Did the RPD err in failing to consider whether prosecution amounts to persecution in the Applicants' case?*

[40] Since I have found it was reasonable for the RPD to conclude the Applicants were not credible, there is no need to decide whether the risk of being prosecuted amounts to persecution.

[41] However, I note that in *Ni v Canada (Citizenship and Immigration)*, 2018 FC 948, Justice Elizabeth Walker found reasonable the RPD's decision that being involved in a protest to demand fair compensation did not amount to persecution on a Convention ground. Further,

shouting anti-government slogans does not necessarily mean that there is a nexus to a Convention ground (*Yan v Canada (Citizenship and Immigration)*, 2018 FC 781 at para 22).

[42] Even if I had accepted that the Applicants were wanted, they have not established that they would be persecuted; they have only established that they would be prosecuted for contravening a law of general application. Mr. Huang testified that he did not want to return to China because he would be arrested and put in jail, not that he would personally be subjected to a risk to life or a risk of cruel and unusual treatment or punishment, or a danger of torture.

[43] While it is true that the Applicants specifically pointed to objective country evidence documenting certain cases of abuse of individuals who protest against land expropriation, the RPD found there was insufficient evidence that the Applicants themselves would be subjected to treatment amounting to persecution.

[44] I find this conclusion to be reasonable. In other words, there is no evidence that persons who have opposed land expropriation are systematically subjected to treatment amounting to persecution, such that it renders unreasonable the RPD's conclusion that the Applicants will not be subjected to persecution. I also note that the government has already expropriated the Applicants' land and would have only a limited, if any, interest in the principal Applicant other than to prosecute him for having participated in an illegal gathering. Lastly, the fact that the sentence for unlawfully opposing an expropriation is harsher in China than in Canada does not amount to persecution.

D. *Did the RPD err in its assessment of the documentary evidence?*

[45] In my opinion, the documentary evidence pointed to by the Applicants does not prove they are at risk of persecution in China. The Notice of Land Expropriation and the Village Land Lease Contract demonstrate that the principal Applicant was operating a fish farm and that he was expropriated, but do not prove that he was pursued by the PSB or that he risks persecution.

[46] While the letter allegedly sent by the principal Applicant's father does corroborate the Applicants' version of events, including their allegations that they are wanted by the PSB, the RPD rejected it on the grounds that there was not sufficient evidence that the Applicants were wanted by the PSB, notably because the PSB had not left any summons or arrest warrant with the Applicants' family in China and because the Applicants had been able to leave the country on their own passports. The RPD was obviously aware of that letter, having made reference to it at paragraph 27 of its decision.

[47] Many refugee claims contain contradictory evidence and it is the RPD's responsibility to weigh it. Not every single piece of evidence in favour of an applicant warrants the acceptance of a refugee claim. Considering the record as a whole, it was reasonable not to afford much weight to this unsworn written statement from a family member.

VI. Conclusion

[48] The conduct of the RPD Member did not give rise to a reasonable apprehension of bias. The RPD reasonably concluded that the Applicants have not established that they are being pursued by the PSB or that they would be subjected to persecution or to a risk to life or a risk of cruel and unusual treatment or punishment, or a danger of torture, should they go back to China.

The RPD reasonably assessed and weighed the evidence before concluding that the Applicants had not credibly established the basis of their allegations.

[49] This application for judicial review is therefore dismissed. The parties proposed no question of general importance for certification and none arises from the facts of this case.

JUDGMENT in IMM-2022-18

THIS COURT'S JUDGMENT is that:

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

“Jocelyne Gagné”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2022-18

STYLE OF CAUSE: SHAOQIAN HUANG ET AL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 4, 2018

JUDGMENT AND REASONS: GAGNÉ A.C.J.

DATED: FEBRUARY 5, 2019

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