Federal Court  Cour fédérale

Date: 20190621

Docket: IMM-3164-18

Citation: 2019 FC 838

Ottawa, Ontario, June 21, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

CHUNXIA ZHU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Chunxia Zhu, is a citizen of China. She claimed refugee protection in Canada on the basis that she had a well-founded fear of persecution in China as a practitioner of Falun Gong. Her claim was heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on April 30, 2018. The applicant testified that, in addition to being wanted by the Public Security Bureau [PSB] in China because of her practice of

Falun Gong there, since she had been in Canada she had continued to engage in the practice of Falun Gong. She alleged that this recent practice would also have come to the attention of authorities in China, thus adding a *sur place* aspect to her claim for protection.

[2] For oral reasons delivered at the conclusion of the hearing, the RPD member rejected the claim, principally on the basis of negative credibility findings. Indeed, the member goes so far as to judge the claim for protection to be "fraudulent."

[3] Given that this is a "legacy" case, the applicant did not have a right of appeal to the Refugee Appeal Division.

[4] The applicant now seeks judicial review of the decision of the RPD under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Her principal contention is that the member misapprehended the information in the record concerning where the applicant was living when she first came to the attention of the PSB and that this had a material impact on the adjudication of her claim.

[5] For the reasons that follow, I agree with the applicant. The application for judicial review will therefore be allowed and the matter will be returned to the RPD for redetermination.

II. BACKGROUND

[6] The applicant was born in January 1992. She claimed that she suffered from chronic health problems (specifically, a hearing problem) for which neither Western nor traditional

Chinese medicine was effective. In 2011, a friend suggested she take up the practice of Falun Gong. The applicant began practicing Falun Gong at home and attending weekly group practices. In June 2012, the PSB raided a group practice session the applicant was attending. The applicant was able to escape but several other members were apprehended by the authorities. The applicant went into hiding. She was informed that on four separate occasions, members of the PSB had come looking for her at her parents' home (where she had been living) or at the homes of relatives. On one of these visits to her parents' home (on June 15, 2012), the PSB left a summons directing the applicant to attend for questioning. The applicant did not attend.

[7] According to the applicant, an agent assisted her to obtain a visa to the United States. She and the agent left China for Seattle, Washington, on August 19, 2012. The applicant was travelling using her own Chinese passport. Upon arrival in Seattle, she and the agent made their way by car and by foot to Vancouver. They did not enter Canada at an authorized Port of Entry. The applicant and the agent then travelled to Toronto.

[8] The applicant initiated her claim for refugee protection on August 27, 2012. When her claim was finally heard by the RPD in April 2018, the applicant testified that while the claim was pending, she continued to engage in the practice of Falun Gong.

[9] The applicant completed her Personal Information Form [PIF] with the assistance of a lawyer on October 25, 2012. In addition to describing the events that led her to flee China, the applicant stated that recently she had learned that the PSB were still looking for her.

[10] On April 6, 2018, the applicant made a number of changes to her PIF, including the following:

- The applicant's place of birth was changed from Guangzhou City to Taishan City.
- The applicant's parents' place of residence was changed from Guangzhou City to Taishan City.
- The location of several of the schools the applicant had attended was changed from Guangzhou City to Taishan City.
- The original PIF stated that the applicant had flown from South Korea to Vancouver. This was changed to Seattle. The applicant's travel from Seattle to Vancouver by car and by foot was then added.

[11] As well, an obvious typographical error in the original PIF regarding the dates of the applicant's places of residence was corrected. According to the amended PIF, from October 2002 until June 2012, the applicant resided at 708 Lunding Village, Haiyan Town, Taishan City, Guangdong Province. Notably, only the date was amended (from October 2012 to October 2002).

[12] The original PIF also stated that from June 2012 until August 2012 (i.e. the time during which the applicant said she was in hiding before she left China), she resided in Jiang Guo Town, Bai Yun District, Guangzhou City, Guangdong Province. There is no evidence that the authorities ever knew that this is where the applicant was hiding.

[13] At the hearing before the RPD, it came to light that the member had not seen the amended PIF. Counsel for the applicant gave the member a copy of the amended PIF but it was never marked as an exhibit. It is unclear from the record whether the member only looked at the amendments relating to the applicant's travel route (the specific issue under consideration when the member learned of the amended PIF) or the entire document. None of the amendments are referred to in the member's reasons.

[14] Prior to her hearing before the RPD, the applicant submitted, among other things, a Resident Identification Card and a Household Register. Both show the applicant's address in China to have been 708 Lunding Village, Haiyan Town, Taishan City, Guangdong Province. The member had initially refused to accept these documents because they were submitted late. However, later in the hearing the member changed his mind and admitted the documents. They are not referred to in the member's reasons.

[15] The applicant was not asked any questions about where she was living when she first came to the attention of the PSB.

III. DECISION UNDER REVIEW

[16] The member accepted that the applicant had established her identity as a citizen of China. However, the member rejected her claim for refugee protection because he did not find the applicant to be credible.

[17] The principal grounds for this conclusion are the following:

- The member found that it "strains credibility" that the applicant could not produce any documentation to corroborate the medical treatment she claimed to have received in China.

- The member drew a "negative inference" from the fact that the applicant's mother did not experience any harassment at the hands of the PSB.

- The applicant could not produce the summons she claimed to have been left at her parents' home because her mother had lost it. The member found that "the lack of documentation in this regard requires it to consider this issue as part of the totality of evidence concerning alleged events in China."

- The applicant stated that she had not received an arrest warrant when she failed to respond to the summons. The member noted that local practices concerning the issuance of arrest warrants varied but found on a balance of probabilities that an arrest warrant would have been issued in this case if the PSB were, in fact, looking for the applicant. The member stated: "The panel notes that the claimant's home city is Guangzhou, a major metropolitan centre and the capital of Guangdong Province. The panel finds on a balance of probabilities [the PSB] would have documented their continuing interest in the claimant." As a result, the member found "that the lack of an arrest warrant undermines the claimant's allegation that a summons was left with her family."

- The member found that the applicant's ability to leave China using her own passport was inconsistent with her allegation that she was wanted by the authorities given the operation of the Golden Shield project. While sometimes there are gaps because local officials do not share information, the member found "on a balance of probabilities that the police

administration in Guangzhou as noted a large metropolitan centre would be connected to the Golden Shield project and would share information regarding criminal fugitives that would be available to airport security officials."

- While the applicant was able to demonstrate knowledge of Falun Gong practices and engagement in them, the member found that this knowledge was acquired solely for the purpose of supporting a fraudulent claim for refugee protection.

[18] On the basis of these findings, the member to rejected the claim in its entirety.

IV. STANDARD OF REVIEW

[19] It is well-established that this Court reviews the RPD's assessment of the evidence before it on a reasonableness standard (*Hou v Canada (Citizenship and Immigration)*, 2012 FC 993 at paras 6-15 [*Hou*]). This standard applies to the RPD's factual findings, including its credibility determinations (*Nweke v Canada (Citizenship and Immigration*), 2017 FC 242 at para 17; *Gaprindashvili v Canada (Citizenship and Immigration)*, 2019 FC 583 at para 20). Applying this standard, this Court should show significant deference to the RPD's credibility findings (*Su v Canada (Citizenship and Immigration)*, 2013 FC 518 at para 7). This is because the RPD is well-placed to assess credibility (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (FCA) at para 4 (QL); *Hou* at para 7). It has the advantage of observing the witnesses who testify and may have expertise in the subject matter that the reviewing court does not share, including with respect to country conditions (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42; *Zhou v Canada (Citizenship*

and Immigration), 2015 FC 821 at para 58). As has been said, credibility determinations "lie within the heartland" of the RPD's mandate (*Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 at para 11). Nevertheless, the reviewing court must ensure that the RPD's credibility findings are reasonable.

[20] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "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). These 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). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[21] The deferential posture to which the reasonableness standard of review gives effect is reflected in section 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7. This provision authorizes a court to grant relief on judicial review if it is satisfied that the decision-maker based its decision "on an erroneous finding of fact that it made in a perverse or capricious manner or

without regard for the material before it." It "provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*" and underscores that administrative fact finding should command a high degree of deference (*Khosa* at para 46).

V. ISSUE

[22] The applicant has challenged the decision of the RPD on several grounds but in my view the determinative issue is whether the member misapprehended a material fact in rejecting the claim for protection.

VI. ANALYSIS

[23] The applicant's claim for protection depended primarily on the credibility of her allegation that she was wanted by the PSB for engaging in the practice of Falun Gong in China. The member found the applicant's evidence wanting in several respects, including on the basis of two considerations relating specifically to the practices of security authorities in China. First, the applicant stated that she had never received an arrest warrant but it was more likely than not that the PSB would have issued one had they actually been looking for her. Second, the applicant stated that she had left China without any difficulty using her own passport but it was more likely than not that she would not have been able to do so if the authorities were looking for her because the Golden Shield would have alerted the authorities that she was about to leave China. Both findings led the member to reject the applicant's evidence about what had happened to her in China.

[24] In making these findings, the member expressly relied on the fact (as he understood it to be) that at the time she said she came to the attention of the PSB the applicant was living in Guangzhou City, "a major metropolitan area." There is no dispute that this is incorrect. The record before the member clearly indicated that the applicant was actually living in Lunding Village, Haiyan Town, Taishan City, Guangdong Province, at the relevant time.

[25] In an affidavit filed in support of her application for judicial review (the admissibility of which was not contested), the applicant states that Lunding Village "is a very small place in a different prefecture of Guangdong Province altogether" than Guangzhou City and that it is "a small village, and not a major metropolitan centre."

[26] I am satisfied that the member's erroneous finding of fact concerning where the applicant was living when she said she came to the attention of the PSB could have affected the outcome of the hearing. The record before the member indicated that the practices of security authorities could vary from place to place, with some of the most pronounced variations being between large metropolitan areas and less developed or populous areas. The respondent points out that at the hearing before the RPD counsel for the applicant (who knew the true state of affairs) did not place any particular reliance on the fact that the applicant was from a small village. While this is true, counsel could not have anticipated that the member would make the mistake he did or what would follow from it.

[27] In his reasons, the member expressly drew support for his findings about how the authorities would have conducted themselves from the fact (as he understood it to be) that the

applicant was living in a large metropolitan area. Given the centrality of where the member thought the applicant was living to the adverse conclusions he reached regarding her credibility, I am satisfied that the member misapprehended the evidence on a material point. The result is a decision that is lacking in justification, intelligibility and transparency. Further, a reasonable decision-maker who did not misapprehend the evidence as the member did could well reach different conclusions regarding the applicant's credibility. As a result, the member's decision cannot stand and there must be a new hearing.

[28] In view of this, it is not necessary to consider the member's determinations with respect to the *sur place* aspect of this claim.

VII. CONCLUSION

[29] For these reasons, the application for judicial review is allowed, the decision of the RPD dated April 30, 2018, is set aside, and the matter is remitted for redetermination by a different decision-maker.

[30] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-3164-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated April 30, 2018, is set aside and the matter is remitted for redetermination by a different decision-maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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