Federal Court Cour fédérale

Date: 20220517

Docket: IMM-4399-21

Citation: 2022 FC 731

Ottawa, Ontario, May 17, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

YUXIN SU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated June 1, 2021, dismissing the Applicant's appeal and confirming the decision by the Refugee Protection Division [RPD], finding the Applicant is not a Convention refugee or a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Decision].

II. Facts

[2] The Applicant is a citizen of China. She fears persecution at the hands of Chinese authorities having breached China's family planning policy and due to her profile as a Falun Gong practitioner.

[3] The Applicant and her husband have a daughter born in 1998. In 2006, the Applicant became pregnant with her second child and was forced to have an abortion and pay a fine. After her abortion, she was required to wear an intrauterine device [IUD], which caused her a lot of pain and discomfort. In November 2010, the Applicant secretly removed her IUD and went to New Zealand, where she stayed until August 2012 (she returned to China).

[4] In 2014, the Applicant became pregnant again and was forced to have another abortion. She was again forced to wear an IUD. In February 2015, the Applicant had her IUD removed by a private doctor without the family planning authorities' knowledge or consent. The Applicant had a regular IUD check-up scheduled for April 2015. The Applicant did not attend the appointment and went into hiding.

[5] In April 2015, the Applicant fled to the US with the help of a smuggler, where she made a claim for refugee protection. While she was in the US, the Applicant alleges family planning officers went to her home in China looking for her.

[6] Following President Trump's election in 2017 and given his anti-immigration policies, the Applicant felt vulnerable to deportation.

[7] The Applicant was introduced to Falun Gong during this time by a friend and she used Falun Gong practice to help her cope with the stress. In July 2018, two of her friends' refugee claims were rejected. Fearing deportation, the Applicant travelled to Canada with the help of a smuggler, where she made a claim for refugee protection.

[8] In a decision dated February 27, 2020, the RPD refused the Applicant's claim for refugee protection. The determinative issue was credibility. The RPD found the Applicant's overall credibility was undermined due to inconsistencies between her Canadian Basis of Claim [BOC] narrative and her American refugee documents in respect to the family planning issues she had when she left China for the US.

III. Decision under review

[9] On June 1, 2021, the RAD dismissed the Applicant's appeal and confirmed the RPD's decision denying refugee status on the basis of credibility. The RAD found the Applicant's claim with regard to her breach of China's family planning policy lacked credibility. There were material inconsistencies and omissions in the Applicant's Canadian narrative and US narrative about core events leading to the Applicant fleeing China. The RAD found the Applicant failed to provide a sufficient explanation for these inconsistencies and omissions.

[10] The RAD further found the Applicant's testimony about her knowledge of Falun Gong, together with the documentary evidence, did not establish she was a genuine practitioner with a *sur place* claim. Even if she was not a genuine practitioner, the RAD determined there was insufficient persuasive evidence before the RAD that her religious activities had come to the attention of the Chinese authorities.

IV. Issues

[11] The issue in this application is whether the RAD's decision is reasonable.

V. Standard of Review

[12] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will

> always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[13] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

> [Emphasis added]

[14] Furthermore, *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are “exceptional circumstances”. The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court’s deferring to a lower court’s factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[15] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director’s decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Analysis

A. *Is the Decision reasonable?*

(1) Material inconsistencies between the Applicant's Canadian claim and US claim

[16] The Applicant submits the RAD erred in drawing negative credibility inferences from the inconsistencies in her Canadian and US narratives because each of her two claims were based on different grounds.

[17] While her US refugee claim was based on her fear of persecution from Chinese family planning authorities, her Canadian claim was based on her Falun Gong practice.

[18] In turn, she submits it was unreasonable for the RAD to make adverse credibility findings on the basis that the Applicant's US claim contained important details about her fear of the family planning authorities that were not included in her Canadian BOC narrative.

[19] The Applicant explained at the hearing before the RPD that although she initially fled China because she feared persecution for violating the family planning policy, she did not want to relive these traumatic experiences, therefore her Canadian claim was based solely on her Falun Gong practice.

[20] I understand such a distinction is possible. However, and with respect the record does not support such a distinction was made in this case. Here, the Applicant stated the following in her BOC, as referred to in the RAD's Decision at para 2:

> [2] In 2015, the Appellant fled China for the United States (US) out of a fear of persecution because she violated family planning policy. While in the US in 2017, the Appellant experienced stress and ill health due to the anti-immigrant policies existing at that time. To cope with her health issues, the Appellant started to practice Falun Gong in September 2017. In 2018, she learned that her friends' US asylum claims were denied, and one of the friends was deported. This news caused the Appellant to come to Canada to claim refugee status.

[21] Having considered the matter carefully, I find that her claims with respect to what happened to her regarding family planning in China are in fact the basis and starting point for her claim respecting Falun Gong. I am unable to unbundle them and focus only on Falun Gong, and ignore the family planning issues which I find are raised both in her Canadian and US claims.

[22] The Respondent submits and I agree that consistency in an applicant's narrative is an important indicator in assessing credibility, and the RAD was entitled to make adverse credibility findings based on the inconsistencies in the Applicant's narratives. While the Applicant's BOC narrative indicates she feared persecution in China due to her Falun Gong practice, much of her narrative also outlines the events surrounding her encounters with family planning authorities. The Applicant did not state she no longer faced a risk of persecution at the hands of family planning authorities and did not indicate to the RPD or RAD that she did not wish to have her claim considered on this ground. The RAD was entitled to consider the lack of details surrounding these incidents in her BOC narrative. The Respondent cites to *Dokaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1416 [per Mactavish J as she then was] at

paras 5-7 [*Dokaj*], where this Court found it is reasonable for the panel to rely upon inconsistencies between earlier evidence provided in support of a US refugee claim and the Applicant's testimony before the RPD. The RPD put these omissions to the Applicant and the RAD considered her explanation.

[23] In this respect, I find in favour of the Respondent. While the Applicant's refugee claim in Canada was primarily based on her *sur place* claim as a Falun Gong practitioner, the fact of the matter is she commenced her claim in Canada with detailed references to her opposition to China's family planning policies and how badly Chinese officials treated her before she fled to the US. Her narrative in this respect was set out in her Canadian BOC, which I note was not prepared by counsel who appeared before this Court. As noted, her claims with respect to what happened to her regarding family planning in China are in fact the basis and starting point for her claim respecting Falun Gong.

[24] Under constraining law, the Applicant's detailed Canadian BOC submissions constitutes a prior inconsistent statement. The jurisprudence establishes a refugee claimant may be examined and credibility assessments may be made based on a prior inconsistent statement. In this respect I rely on the reasons of Justice Mactavish in *Dokaj, supra* at paras 5-8:

> [5] I agree with counsel for Mr. Dokaj that a tribunal cannot simply look at findings of fact and credibility made by an earlier adjudicative body, and adopt those findings as its own. This would amount to an abdication of the Board's responsibility to make an independent assessment of the facts, based upon the evidence before it. In other words, it would not have been open to the Board to say that because the US immigration judge did not believe Mr. Dokaj's story, the Board did not believe him either. That is not, however, what happened in this case.

> [6] It is evident from a review of the Board's decision that what the Board did was look at Mr. Dokaj's testimony in the US proceeding and compare it with the story that he told before the Board. The Board noted that there were significant discrepancies between the two stories, particularly as it related to the dates that he allegedly worked for the French television company. The Board then relied upon these inconsistencies to find that Mr. Dokaj's evidence was not credible.
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> [7] In my view, there was nothing improper about this. Mr. Dokaj's testimony before the US immigration judge amounted to a prior inconsistent statement. It was no different for the Board to have relied upon inconsistencies between Mr. Dokaj's earlier evidence and his testimony before the Board than it would have been for the Board to have relied upon inconsistencies between a claimant's testimony before the Board and statements given by the claimant at the Port of Entry or in the claimant's Personal Information Form.
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> [8] Mr. Dokaj does not deny that his evidence before the American immigration judge was different than his testimony before the Board. He explains the discrepancies by saying that he was upset and confused when he testified in the American proceeding because of the recent deaths of his father and his uncle. It is clear from the Board's reasons that the Board considered and rejected this explanation. This finding was one that was reasonably open to the Board and I see no basis for interfering with it.

[25] To the same effect is the decision of Justice Gagné as she then was in *Li v Canada (Citizenship and Immigration),* 2018 FC 877 at para 29:

> [29] First, I agree with the findings of this Court that it is "permissible for the RPD [or RAD] to assess an applicant's genuineness and therefore *sur place* claim in light of credibility concerns relating to the original authenticity of a claim" (*Zhou v Canada (Citizenship and Immigration*), 2015 FC 5 at para 23). In my view, it would be an error to ask the RPD and RAD to analyze each issue raised by an asylum claimant in isolation, without regards to the credibility of the evidence filed in support of a different issue. A credibility assessment generally requires considering the entirety of the evidence adduced and a negative credibility finding is likely to taint all aspects of the claim.

[26] I am unable to accept the submission that either the RPD or the RAD should have ignored the inconsistent accounts of the Applicant’s family planning issues before she left China for the US. Her inconsistent statements were made in writing on forms with substantially the same legal effect, one to US refugee authorities, and the other in her BOC to Canadian authorities.

[27] I am also unable to distinguish between them on the basis the US form was not a finding of a US court. While that is correct, the fact of the matter is both statements were made by the Applicant herself, and there were inconsistencies between them. In my view both the RPD and RAD were required to consider them in the context of her Canadian refugee claim albeit one that focussed on Falun Gong.

[28] Moreover, her Canadian BOC allegations concerning family planning authorities and forced abortions were important events that led to her fleeing China. Indeed the main point of her appeal to the RAD was to distance herself from those portions of her own BOC dealing with family planning issues in China before she left for the US. However, what the Applicant could not overcome was the manner in which she had chosen to intertwine the Falun Gong and family planning claims.

[29] Additionally, the Applicant submits the RAD erred in drawing negative credibility findings from the inconsistencies in her US narrative because the RAD did not know if there were circumstances surrounding the preparation of the US claim that could have impacted the completeness of the narrative, i.e. her mental and emotional state at the time she prepared her US claim, if she was appropriately advised, if there were issues with the translator, of if she wished

to make further amendments to her US narrative. The Applicant submits the RAD's finding on this point constituted a breach of procedural fairness.

[30] I am unable to accept these submissions because as already noted, she made statements in her Canadian BOC that are inconsistent with statements she made in her US equivalent.

[31] The Respondent submits and I note as well, the RAD considered these arguments and concluded the RPD provided the Applicant with ample opportunities to explain the inconsistencies between her Canada and US narratives. The onus was on the Applicant to establish her allegations and the RAD found her onus was not satisfied in this respect.

(2) *Sur place* claim as Falun Gong practitioner

[32] The Applicant submits the RAD's assessment of whether she is a genuine Falun Gong practitioner was unreasonably focused on activities that might enhance her practice, rather than assessing her knowledge and participation in Falun Gong. The Applicant submits the RAD found she demonstrated sufficient knowledge of Falun Gong when she was questioned about her practice, and merely took issue with the support letters she provided because they contained similar phraseology.

[33] The Applicant submits the documents provided in support of her claim, namely two support letters and three photos, as a Falun Gong practitioner benefit from the presumption of truth. If the RAD had concerns about the authenticity of these documents, she submits it should have undertaken to contact the authors of the letters or other steps to assess its authenticity,

instead of dismissing the documents on the basis they were unsworn. The Applicant relies on this Court's finding in *Paxi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 905 [per Russell J] [*Paxi*] to support this assertion:

> [52] The letter is written on church letterhead, it is dated, and is signed by the Pastor Eduardo. There is no legal or statutory requirement in the *Refugee Protection Division Rules of Procedure*, SOR/2012-256, that documents be notarized or that identification documents are required. However, the rationale for giving the letter "very little evidentiary weight" for credibility purposes is that it was not dated, it was not notarized, and there were no objective identification documents. The letter is, in fact, dated. The implication that documents must be notarized or accompanied by other "objective identification documents" before they can be given real evidentiary weight overlooks the strong evidence of authenticity contained in the letter itself. Besides the church letterhead, the date, and the signature of the Pastor Eduardo, the letter is detailed and authoritative, and it provides detailed contact information, including a phone number, and clearly makes it easy for anyone who doubts its authenticity to check it out. These are not the signs of an inauthentic document, and if the Board thought that a missing date was material, then the Board's mistake over the date means it overlooked a material fact. The letter is of extreme importance for the Applicants' situation. It seems odd that if the Applicants say they are fleeing what the Pastor Eduardo calls "a terrible situation," the Board would simply not take the opportunity to use the contact information provided by the letterhead before demanding notarized and other objective identification documents. Lives are at stake here, and yet a simple check is not made. For the Board to take issue with the authenticity of the document yet make no further inquiries despite having the appropriate contact information to do so is a reviewable error: *Kojouri v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389 at paras 18-19; *Huyen v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 904 (CanLII), [2001] FCJ No 1267 at para 5.

[34] The Respondent acknowledges the RAD found the Applicant had sufficient knowledge of Falun Gong and determined that even if the Applicant was not a genuine practitioner, she could still be at risk upon return to China if her religious activities in Canada came to the attention of

the Chinese authorities. However, the Respondent says the RAD reasonably assigned little weight to the Applicant's testimony on her Falun Gong practice given its credibility concerns regarding the discrepancies in her evidence. Similarly, the RAD assigned little weight to the support letters due to the similar phraseology used by the authors and because they did not elaborate on the Applicant's Falun Gong practice other than the bald statement that she was a Falun Gong practitioner. The RAD also found the photos provided were not sufficient to outweigh or rehabilitate its overall negative credibility concerns.

[35] In my view, the Applicant's reliance on this Court's decision in *Paxi* does not advance her case because *Paxi* may be distinguished. Unlike in *Paxi*, the RAD in this case did not assign little weight to the support letters on the basis they were not notarized nor accompanied by identity documents. Here the letters were only a few lines long and remarkably, given they were stated to be from persons who did not know each other, each said the Applicant was "honest" and "nice to people". I am not prepared to interfere with the findings of the RAD and RPD in respect of these two letters. Furthermore, I note there is a difference between knowing of Falun Gong practices and being a genuine practitioner: the RAD and RPD found the Applicant knew the practices but was not a genuine practitioner. These findings are entitled to deference. In addition, the onus is on an applicant to make their case to the RAD.

[36] On the record before it, the RAD was entitled to find the Applicant had not met her evidentiary burden in establishing her Falun Gong practice was genuine. As this Court per Justice Gleason, as she then was, found in *Su v Canada (Minister of Citizenship and Immigration)*, 2013 FC 518, "there is nothing unreasonable in finding that a few letters and

pictures do not establish that a claimant is a genuine adherent to a religion" (at para 17). That is the same situation as here, where there were two extremely brief letters and three photographs.

[37] The Applicant further submits the RAD applied the wrong test in assessing the Applicant's *sur place* claim. The RAD found there was no evidence the Chinese authorities were aware of the Applicant's ongoing Falun Gong practice in Canada. She submits this is not a requirement to establish a *sur place* claim. In assessing a *sur place* claim, the panel must ask whether, on a balance of probabilities, the Applicant's activities in Canada place them at risk of harm upon return to China (*Win v Canada (Minister of Citizenship and Immigration)*, 2008 FC 398 at paras 28-30). It is sufficient for the Applicant to establish she is a genuine practitioner who would be unable to freely practice in China.

[38] However, I accept the law in this respect as set out by Justices Diner and Gagné. In *Zhang v Canada (Citizenship and Immigration),* 2016 FC 765, Justice Diner held at paras 27-30:

> [27] When analysing the *sur place* claim, the RAD stated that there was no evidence to indicate that the Applicants' actions in Canada had come to the attention of authorities in China. Therefore, as per *Wang*, the RAD found that this claim could not be supported:
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> > [37] The RAD, in its review of the record, finds that there was insufficient reliable evidence and satisfactory probative evidence submitted/adduced at the RPD, including during the RPD hearing, to show that the Appellants' practice of Falun Gong has come to the attention of Chinese authorities or that they would be perceived to be genuine Falun Gong practitioners upon return to China. In this respect, the RAD is guided by the Federal Court Trial Division decision in *Wang* which held that a *sur place* claim could not be maintained in the absence of evidence that the making of the refugee

> claim had specifically come to the attention of the authorities of the claimant's country of origin.
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> [28] The Applicants argue that the RAD misconstrued the evidence and that *Wang* does not apply. According to the Applicants, *Wang* involved a distinct set of facts: there, the claimant based his *sur place* claim on the fact that his application for refugee status had been reported in the Chinese media. The *sur place* claim in *Wang*, in other words, depended by necessity on proving that the media attention existed and would make the authorities pay attention to the claimant. The Applicants submit that this does not, as the RAD has interpreted it, translate into a broad general proposition that any *sur place* claim must provide evidence that the making of the claim had come to the attention of the authorities in the Applicant's home country.
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> [29] I disagree and find the RAD's analysis on this point reasonable. Regardless of the particular facts in *Wang*, Justice Pelletier was clear in that case that "the essential problem for the applicants is the fact that no evidence was before the [Convention Refugee Determination Division], documentary or otherwise, that substantiated their *sur place* allegation" (para 20). In other words, *Wang* stands simply for the proposition that a *sur place* claimant, like any claimant, must have an evidentiary basis for their allegations.
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> [30] A similar conclusion was drawn here: the RAD evaluated the evidence and did not believe, on a balance of probabilities, that the Applicants were actual practitioners in Canada. Nor was there any evidence that Chinese authorities believed that they were. The RAD assessed the evidence before them independently in arriving at this conclusion, consistent with the instructions of *Huruglica FCA*. As such, while the RAD may have phrased its assessment better, I do not find that it misapplied the law relating to *sur place* claims or otherwise erred unreasonably.

[39] Moreover in *Li, supra* at paras 30-31, Justice Gagné held:

> [30] As to the RAD's alternative finding that the evidence does not show that Mrs. Li's practice in Canada came to the attention of the Chinese authorities, I find that it is reasonable, as supported by the decision of this Court in *Zhang v Canada (Citizenship and Immigration)*, 2016 FC 765 at paras 27-30. In this case, Justice Alan Diner found that it was reasonable to reject a *sur place* claim

> in the absence of evidence that the refugee claim had come to the attention of the authorities in the claimant's country of origin.
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> [31] The documentary evidence that the Chinese government monitors the practice of Falun Gong does not contradict the RAD's finding that there is no evidence suggesting Mrs. Li's practice has come to the attention of the Chinese authorities. To find differently would be to confirm that the minute a refugee claimant attended a Falun Gong practice in Canada, his or her *sur place* claim would be made. I do not support such a result.

[40] The jurisprudence established it was reasonable for the RAD to reject the Applicant's *sur place* claim in the absence of evidence her activities had come to the attention of the Chinese authorities.

VII. Conclusion

[41] In my respectful view, given the facts of this case and constraining jurisprudence, the RAD decision is reasonable in that it is transparent, intelligible and justified. Therefore, judicial review will be dismissed.

VIII. Certified Question

[42] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-4399-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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