

Federal Court



Cour fédérale

Date: 20141216

Docket: IMM-5048-13

Citation: 2014 FC 1221

Ottawa, Ontario, December 16, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JIAWEN YE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada, dated July 9, 2013, wherein the RPD found that the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

Background Facts

[2] The Applicant is a citizen of China. She claims that she fears persecution as a result of being an adherent of the spiritual discipline of Falun Gong.

[3] After graduation from vocational school the Applicant was unable to find employment. The stress of this situation caused her to suffer symptoms of depression and insomnia. Although she sought medical assistance, it did not help. In October 2010, a family friend, Uncle Jialin Liu, visited her and became concerned for her health. He introduced her to Falun Gong. She began to study the discipline and its primary documents and met with other practitioners in secret. Her symptoms improved, which correspondingly enabled her to obtain employment.

[4] On August 3, 2011, while she was on a business trip away from her hometown of Guangzhou City, the Applicant received a call from Uncle Liu's wife informing her that he had been arrested the night before by the Public Security Bureau (PSB). His wife suggested that the Applicant go into hiding, which she did at a friend's home in the suburb of Guangzhou City. During this time, and before she left China, she learned that the PSB had gone to her home on four occasions to arrest her and that two more practitioners had been arrested. She arrived in Canada on December 18, 2011 and filed a claim for refugee protection. She later learned that another practitioner had been arrested and that the PSB had gone to her home twice more looking for her.

Decision Under Review

[5] The RPD denied the Applicant's claim for refugee protection stating that the determinative issue was credibility (*Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 44; 2008 FCA 381 at para 3). The RPD set out numerous reasons for this finding including that:

- When the Applicant was asked how long she practiced Falun Gong in China, she hesitated and eventually responded that it was over a span of six months, which would have been from October 2010 to April 2011. However, in her Personal Information Form (PIF), the time frame referenced by the Applicant was from October 2010 to August, 2011, a period of 10 months;
- Other than her passport, which was issued in the province of Guangdong on May 5, 2011, the Applicant was unable to provide any corroborating evidence establishing that she worked or resided in Guangzhou City from October 2010 until August 2011, when she went into hiding;
- The Applicant indicated that on the day in October 2010 when she met with Uncle Liu, he left her home without having spoken to her parents. Given the Applicant's age, being 18, her mental state at the time, and, that it was her parents who had arranged the meeting, the RPD found that it would have been reasonable to expect that her parents would have discussed what Uncle Liu had suggested to treat their daughter. She further testified that her parents were not aware that Uncle Liu practiced Falun Gong, which the RPD found unlikely given the length of time they had known him and the level of trust they displayed in him by allowing him to counsel the Applicant;
- There was no corroborating evidence that Uncle Liu or other practitioners had been arrested, nor any evidence to suggest that the Applicant's family had been questioned or harassed after her departure. In addition, it was reasonable to expect that the PSB would have contacted her employer and that someone there would, in turn, have contacted the Applicant to alert her to the inquiries. Yet, the Applicant had no knowledge of such activities nor had she contacted her employer to ascertain whether the PSB had inquired about her;
- The RPD did not believe that the Applicant was able to avoid detection by the PSB from August 10, 2011 to December 12, 2011 given that she remained in Guangzhou City. Further, while in hiding the Applicant twice applied for, and was ultimately successful in obtaining, a student visa to the United States in December 2011. The RPD was not convinced, even if she was making the applications with the help of a snakehead, that she could have maintained such a low profile so as to avoid detection, nor that she could have avoided detection when she departed China using her own passport. Her PIF also did not

mention the alleged bribing of an official by the snakehead that she claimed facilitated her departure; and

- Although her testimony was that the PSB visited her parents' home on 10 occasions, the last visit being March 26, 2013, the Applicant did not amend her PIF to reflect this, or that the PSB was recently and actively looking for her. The Applicant was also unable to provide corroborating evidence, such as a summons. Given the level of interest the PSB had displayed as to her whereabouts, and the fact that she had eluded capture, it was reasonable to conclude that a warrant for her apprehension would have been issued.

[6] As a result of the credibility concerns above, the RPD found that Applicant had not demonstrated the existence of a well-founded fear of persecution.

[7] Further, while the Applicant submitted evidence in support of her contention that she practices Falun Gong every day, and with other adherents in Milken Park, the RPD was not satisfied that her practice was genuine and that she would continue this practice if removed to China, placing her at risk in that country.

[8] The RPB concluded, having considered all the evidence, that the Applicant is not a Convention refugee as she had not established, on a forward looking analysis, that there is a reasonable chance or serious possibility that she would be persecuted on a Convention ground, or that there would be a risk to her life or that she would be subjected to cruel and unusual treatment or punishment should she be required to return to China.

Issues

[9] I would frame the issues in this matter as follows:

1. Did the RPD hold the Applicant to an incorrect standard of proof or apply the wrong test in assessing the section 96 claim?

2. Did the RPD misapprehend the evidence?

Standard of Review

[10] The Supreme Court of Canada has held that a standard of review analysis does not necessarily need to be conducted when the standard has been adequately established by prior jurisprudence (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57 [*Dunsmuir*]).

[11] It has previously been well established that decisions of the RPD involving questions of credibility are within the domain of the RPD's expertise and are to be reviewed on a standard of reasonableness (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 619 at para 26; *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at para 23; *Ma v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1057 at para 24; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 42 [*Rahal*]). Reasonableness is concerned with justifiability, intelligibility and transparency in the decision making process, and the Court should not intervene with the conclusions of the decision maker unless they fall outside the range of possible, acceptable outcomes, defensible in respect of the facts and the law (*Dunsmuir*, above, at para 47).

Analysis

ISSUE 1: Did the RPD hold the Applicant to an incorrect standard of proof or apply the wrong test in assessing the section 96 claim?

Applicant's Position

[12] The Applicant submits that the use of the word “convinced” by the RPD in its decision indicates that it erred by imposing a higher standard of proof than the applicable standard, which is the balance of probabilities. Whether or not the Applicant was a genuine Falun Gong practitioner was a question of fact attracting the balance of probabilities standard of proof, she did not have to convince the RPD of this. Similarly, the RPD erred in imposing an elevated standard of proof on the Applicant to establish that her fear of persecution in China was well-founded (*Alvarez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 154 at para 5 [*Alvarez*]; *Bui v Canada (Minister of Immigration and Citizenship)*, 2001 FCT 1178 at para 4).

[13] Further, in paragraph 31 of its reasons, the RPD misstated the test regarding a well-founded fear of persecution. The RPD stated that it was not satisfied that the Applicant was a genuine Falun Gong practitioner, and that if returned to China today, that such practice “would” place her life at risk or heightened risk. The Applicant submits that the legal test for well-founded fear of persecution is that a claimant must establish “good grounds” or “reasonable chance” for fearing persecution (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA) at paras 5 and 12). The RPD erred in its interpretation and application of the legal test, which is a reviewable error (*Ponniah v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 359 (FCA); *Wang v Canada (Minister of Employment and*

Immigration), [1994] FCJ No 1150 at paras 2-3; *Chichmanov v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 832 (FCA); *Tariq v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 540 at para 29; *Yip v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1285 at para 7; *Alvarez*, above, at para 5; *Arrinaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 773 at para 44).

Respondent's Position

[14] The Respondent takes the view that the RPD sufficiently indicated its awareness of the appropriate standard of proof and that its decision did not rest on this, but on the Applicant's lack of credibility. Absent some credible evidence to support or corroborate her claim, it failed on any standard (*Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 95 at para 42 [Chen]; *Lui v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1028 at para 4). Having determined that the Applicant was not credible, and as she failed to corroborate her claim, the RPD reasonably found that there was insufficient evidence that her claim was objectively well-founded. The RPD also properly stated the serious possibility of persecution test in its conclusion (*Ndjizera v Canada (Minister of Citizenship and Immigration)*, 2013 FC 601 at para 29 [Ndjizera]).

Analysis

[15] In order to properly evaluate the first issue, it is important to recognize that this Court is charged with reviewing the reasonableness of the RPD's decision – that is, the RPD's findings of fact as applied to the legal test for refugee protection (*Ndjizera*, above, at para 26). The burden

of proof in refugee proceedings, the balance of probabilities, is the standard upon which an Applicant must establish a given fact. The legal test for protection is whether, in view of those facts, the Applicant faces a serious possibility of persecution.

[16] The burden of proof and its application was addressed by Justice O'Reilly in *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 [*Alam*]:

[4] The Board concluded its analysis of Mr. Alam's case with the following statement: "The claimant did not discharge his burden of proof sufficiently to establish, on a balance of probabilities, his claim is well-founded".

[5] While the burden of proof on a claimant for refugee protection is well-known and widely accepted, it is notoriously difficult to express in simple terms. Justice Mark MacGuigan stated the proper test in *Adjei v. Canada (Minister of Employment & Immigration)*, [1989] 2 F.C. 680, [1989] F.C.J. No. 67 (C.A.) (QL):

It was common ground that the objective test is not so stringent as to require a probability of persecution. In other words, although an applicant has to establish his case on a balance of probabilities, he does not nevertheless have to prove that persecution would be more likely than not.

...

What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility. (At p. 683.)

[6] This is an awkward standard of proof to articulate. This Court has recognized that various expressions of this standard are acceptable, so long as the Board's reasons taken as a whole indicate that the claimant was not put to an unduly onerous burden of proof. For example, Justice Carolyn Layden-Stevenson found

that the Board had expressed itself adequately when it stated: "Nothing in the evidence before me indicates that should the principal claimant's mother return to Albania, on balance of probabilities, there is a serious possibility that she would be targeted for persecution" (*Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, [2004] F.C.J. No. 771 (QL), at para. 11). Similarly, Justice Pierre Denault found the following to be acceptable:

Based on the evidence, the panel finds that on a balance of probabilities, there is no objective basis to support the claim in subjective fear, and there is no "reasonable chance" that the claimant would face persecution for any of the grounds stated in the Convention Refugee Definition in the Immigration Act, if she returned to Russia. (*Seifemlioukova v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1163 (T.D.) (QL), at para. 3)

[7] By contrast, in cases where the Board seemed to be demanding too much proof from a claimant, the Court has ordered a new hearing. For example, Chief Justice Julius Isaac found that the Board had erred when it stated that it was "not convinced that the claimant faces a reasonable chance that he would be persecuted for his political opinions should he return to Bulgaria" (*Chichmanov v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 832 (C.A.)(QL); see also *Mirzabeglui v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 50 (C.A.) (QL)). In *Adjei*, above, Justice MacGuigan disapproved of the Board's expression of the standard of proof when it said that the evidence before it was "insufficient for it to conclude that there are substantial grounds for thinking that persecution would result. . .".

[8] The lesson to be taken from *Adjei* is that the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context. Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a *risk* of persecution, it is inappropriate to require them to prove that persecution is probable. Accordingly, they must merely prove that there is a "reasonable chance", "more than a mere possibility" or "good grounds for believing" that they will face persecution.

[9] The case law referred to above shows that where the Board has articulated the gist of the appropriate standard of proof (*i.e.* the combination of the civil standard with the concept of a "reasonable chance"), this Court has not intervened. On the other hand, where it appears that the Board has elevated the standard of proof, the Court has gone on to consider whether a new hearing is required. Further, if the Court cannot determine what standard of proof was applied, a new hearing may be necessary: *Begollari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1340, [2004] F.C.J. 1613 (T.D.) (QL).

[10] Where the Board imposes a burden of proof that is too high, there is a chance that an unsuccessful claimant might otherwise have succeeded. However, in some cases, an error would be purely academic. This would be the case in situations where the claimant's evidence is so weak that it could not possibly meet even the "reasonable chance" standard: *Brovina*, above.

[11] Accordingly, the Court's role on judicial review in these circumstances is to determine whether the Board applied the appropriate standard of proof. If not, the Court must then decide whether the error requires a new hearing.

(also see *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 120 [*Chan*]; *Ramanathy v Canada (Minister of Citizenship and Immigration)*, 2014 FC 511 at paras 15-17).

[17] The Applicant cites the use of the term "convinced" by the RPD as demonstrating that it applied a standard of proof higher than the civil standard:

...the panel is not convinced that the claimant was able to keep such a low profile for four months... (decision at para 22)

Given the credibility findings mentioned earlier in these reasons, the panel is not remotely convinced that the claimant bribed an official at the port of exit given that China has exit controls (decision at para 22)

The panel has not been convinced that the claimant is a Falun Gong practitioner (decision at para 31)

[18] In *Lemoine v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1031 at para 8, the decision under review had found that the claimant in that case had not clarified the RPD's credibility concerns to its "satisfaction". Justice O'Reilly concluded that when the Board used the term, they were "merely stating an overarching basis for its ensuing adverse credibility findings" and that read as a whole, the reasons did not evidence an incorrect application of the standard.

[19] Further, a similar argument regarding the RPD's usage of "convinced" was recently rejected by Justice LeBlanc in *Avagyan v Canada (Citizenship and Immigration)*, 2014 FC 1004 at paras 36-38 [*Avagyan*]. There, the claimants asserted that by requiring that it be "convinced", the RPD imposed an excessive burden of proof. Justice LeBlanc found that the subject statement was part of the assessment of the facts of the case and not a statement regarding the applicable legal test. The RPD had properly assessed, on the balance of probabilities, the evidence adduced by the claimant for purposes of making its factual findings, then it assessed whether those facts placed him at risk of persecution (*Avagyan*, above, at para 37; *Pararajasingham v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1416).

[20] In my view, the RPD's use of the word "convinced" in this case is also simply an expression of its assessment of the credibility of the Applicant based on the factual basis of her claim and is not a misstatement of the standard of proof.

[21] Decisions should be read as an organic whole, without a "without a line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving*

Pulp & Paper Ltd, 2013 SCC 34 at para 54; also see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14-15). Having reviewed the RPD's reasons in whole, I am not satisfied that by the use of the word "convinced" it imposed an onerous standard of proof in this case.

[22] In any event, and as set out below, based on the evidence presented by the Applicant, her claim could not succeed on any standard.

[23] With respect to the section 96 test, the Applicant takes issue with the RPD's statement that it was not satisfied that the Applicant is a genuine Falun Gong practitioner and that if required to return to China, that such practice "would" place her life at risk or at heightened risk. And, while in the concluding paragraph of its decision the RPD did set out the correct test, the Applicant submits that this is simply the use of boiler plate conclusionary language and is not indicative of the correct application of the test. As noted above, the section 96 test is that a claimant must establish on a balance of probabilities that there exists "serious possibility" of persecution (*Chan*, above, at para 120).

[24] The statement of the RPD which is at issue was made in the context of the evidence the Applicant had submitted to corroborate her claim that she is a Falun Gong practitioner in Canada, which the RPD did not accept as satisfactory to establish this fact. It stated that "The panel has not been convinced that the claimant is a Falun Gong practitioner and that if required to return to China today, that such practice would place her life at risk or heightened risk. The panel disbelieves the evidence as submitted based on the totality of the evidence". In my view,

the RPD was making a credibility finding based on the evidence before it, however, it did not correctly articulate the section 96 test.

[25] This is not necessarily fatal, as stated in *Alam*, above:

[13] Mr. Alam did have the burden to prove, on a balance of probabilities, that his fear of persecution was well-founded. However, the Board's statement leaves out the "reasonable chance" or "more than mere possibility" threshold. Had the Board simply said that Mr. Alam had failed to establish that there was a reasonable chance he would be persecuted, no error or ambiguity would have arisen. But in the absence of words indicating that it was applying the correct standard, the Board seems to have required Mr. Alam to prove persecution on a balance of probabilities. This is a clear error. Indeed, the respondent concedes that the Board erred in this respect.

[14] The next question, then, is whether the Board's error requires a new hearing. The Board found that Mr. Alam had failed to prove the facts underlying his claim. It said:

After a review of the claimant's demeanour, the willingness to alter his narrative to have it be consistent with letters in evidence, the inconsistency of the place where the abduction occurred, and the total lack of understanding as to what occurred at the meetings of the group to which he was a member satisfies me that the claimant's evidence is not credible.

[26] In this case, the RPD made it abundantly clear that it found the Applicant to lack credibility, its reasons for this and that credibility was determinative. The RPD's findings as to the future possibility of persecution were reasonable in light of this credibility assessment. As stated in *Alam*, above, "...where the Board has made an error of law regarding a fundamental issue, such as the appropriate standard of proof, the Court should generally order a new hearing unless it is clear that the claim could not possibly succeed" (at para 16). In light of the RPD's

multiple credibility findings, any mischaracterization of the section 96 test had no effect on the result in this case. Where the RPD makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim. The claimant bears the onus of demonstrating there was such evidence (*Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381 at para 3; *Toma v Canada (Citizenship and Immigration)*, 2014 FC 121 at para 22 [*Toma*]; *Lopez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 102 at para 41). The Applicant did not provide such evidence in this case.

ISSUE 2: Did the RPD misapprehend the evidence?

Applicant's Position

[27] The Applicant also submits that the RPD engaged in speculative reasoning and viewed her evidence through an impermissible microscopic lens. Examples of this include: the negative credibility inferences drawn from the failure of her parents to speak with Uncle Liu after his conversation with their daughter and that they were not aware of his Falun Gong practices; the Applicant's lack of knowledge as to whether the PSB visited her employer after she went into hiding; and, her ability to leave China on her own passport. Similarly, the RPD unreasonably required the Applicant to establish how the PSB discovered her involvement in Falun Gong activities.

Respondent's Position

[28] The Respondent submits that the RPD did not restrict its considerations of the Applicant's credibility to microscopic issues. The RPD articulated its reasons for finding the Applicant not credible, including omissions from her PIF and the lack of plausible details to the story. Given her lack of credibility, it sought some corroboration of the claim but the Applicant provided none.

Analysis

[29] The RPD may make negative credibility findings based on inconsistencies in testimony and perceived implausibility, so long as they are based on reasonable inferences. A claim may be evaluated on plausibility, common sense and rationality (*Rahal*, above, at paras 41-46; *Toma*, above, at para 11). While I agree that the RPD's reasoning that the PSB would have visited the Applicant's place of employment and that it was reasonable to infer that others there would then have contacted the Applicant, who was in hiding, to alert her to this, is not sound, overall, the inferences of the RPD are not based on speculative reasoning. They do not involve the RPD applying its subjective imagination or making findings that lack any evidentiary basis (*Avagyan*, above, at para 29; *R v McClure*, 2001 SCC 14 at para 53). Further, the deficiencies listed by the RPD are material as they go to the heart of the Applicant's claim.

[30] Determining the credibility of a claimant is factual in nature. "The jurisprudence is clear in stating that the Board's credibility and plausibility analysis is central to its role as trier of facts and that, accordingly, its findings in this regard should be given significant deference" (*Lin v*

Canada (Minister of Citizenship and Immigration), 2008 FC 1052 at para 13; *Chen*, above, at para 31). Given that the RPD is the party best placed to assess the credibility of claimants within the refugee process, their conclusions are entitled to considerable deference (*Toma*, above, at paras 9-11).

[31] Given the considerable deference owed and the RPD's negative credibility findings for inconsistencies and implausibilities in the Applicant's narrative, the RPD's ultimate decision falls within a range of reasonable outcomes (*Imaniraguha v Canada (Minister of Citizenship and Immigration)*, 2014 FC 349 at paras 31-32). I see no error in the RPD's treatment of the evidence nor any basis to disturb its findings in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed; and
2. No question for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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