Federal Court  Cour fédérale

Date: 20160729

Docket: IMM-5412-15

Citation: 2016 FC 887

Ottawa, Ontario, July 29, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

LIQIN DENG
YONGQIANG ZHAO

Applicants

AND

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Deng and Mr. Zhao, the applicants, are citizens of China. They left China in April 2015 and sought refugee protection in Canada on the grounds that they fear persecution by the Chinese government due to their religious beliefs. Their claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]. The applicants appealed the RPD finding to the Refugee Appeal Division [RAD] of the IRB.

[2] In upholding the RPD decision the RAD concluded that on a balance of probabilities the applicants' allegations were not credible. The RAD then conducted a *sur place* analysis, an analysis that the RPD did not undertake. The RAD concluded that the evidence was not sufficient to establish a *sur place* claim.

[3] The applicants argue that the RAD unreasonably refused to admit new evidence they submitted on the appeal. They further argue that the RAD had no jurisdiction to determine the *sur place* aspect of the claim and that the RAD unreasonably assessed their religious identity. The applicants ask that the RAD decision be quashed and the matter returned to a differently constituted panel for redetermination.

[4] The Application raises the following issues:

A. Did the RAD reasonably refuse to admit the proposed new evidence?

B. Did the RAD err in addressing the *sur place* issue? and

C. Was the decision otherwise reasonable?

[5] I am not persuaded by the applicants' arguments and therefore dismiss this Application for judicial review.

II. Standard of Review

[6] The applicants submit that this Court should adopt a reasonableness standard of review in considering issues A and C above, but that that issue B, the *sur place* matter, raises a question of jurisdiction reviewable on a standard of correctness. I do not agree.

[7] In considering the *sur place* matter the RAD was interpreting its home statute, specifically subsections 111(1) and 111(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Where a tribunal is interpreting its home statute there is a presumption that the reasonableness standard of review applies to that interpretation (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 30-33 [*Huruglica*]; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 54 [*Dunsmuir*]). The issue raised here is not one of true jurisdiction but rather one of interpretation. I will adopt a reasonableness standard of review in considering all of the issues raised.

III. Analysis

A. *Did the RAD reasonably refuse to admit the proposed new evidence?*

[8] The applicants submitted new evidence to the RAD in the form of an affidavit from a leader of the Church of Almighty God in Canada and printouts from the Church's website.

[9] The RAD refused to accept the proposed new evidence. The RAD noted that subsection 110(4) of the IRPA limits new evidence to that which arose after the rejection of the claim by the RPD or evidence that the applicants could not reasonably have been expected to present before

the RPD. The RAD found the new evidence did not satisfy the requirements of subsection 110(4) of the IRPA.

[10] The applicants submitted that since RAD appeals are intended to be full fact based appeals it ought to have adopted a more flexible approach to the admissibility of new evidence. In failing to do so the RAD applied subsection 110(4) of the IRPA in an unreasonable manner. I cannot agree.

[11] The RAD reasonably refused to admit the applicants' proposed new evidence pursuant to subsection 110(4) of the IRPA. It was reasonably open to the RAD to conclude that the applicants could have obtained and provided the information to the RPD. Similarly, it was reasonably open to the RAD to reject the applicants' explanation that they could not have foreseen the RPD would render negative findings based on religious identity where religious identity was central to the claim. Finally, the recent decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] refutes the applicants' argument that the RAD should apply a flexible approach to the admissibility of new evidence under subsection 110(4) of the IRPA (*Singh* at paras 54, 72).

[12] The RAD reasonably refused to admit the applicants' new evidence on the appeal.

B. *Did the RAD err in addressing the sur place issue?*

[13] In its decision, the RAD acknowledged that the RPD had neither conducted a *sur place* analysis nor addressed the issue of *sur place* in its reasons. The RAD also acknowledged the

applicants' position that the RAD lacks jurisdiction to address the *sur place* issue and must remit the matter back to the RPD for redetermination. The RAD however determined that since the applicants raised *sur place* as an issue on the appeal it had jurisdiction to address the issue and does so.

[14] The applicants submitted that the RAD erred in finding it had jurisdiction to independently assess the *sur place* aspects of the applicants claim, relying on *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551 [*Jianzhu*]. The applicants argued that the RAD can only set aside and substitute a determination of the RPD where the RPD has actually rendered a decision on the issue. Where no decision has been rendered the RAD cannot independently evaluate the matter and reach a determination, it must refer the matter back to the RPD. I disagree.

[15] The RAD reasonably concluded that this case is distinguishable from *Jianzhu*. In *Jianzhu* neither the appellants nor the RPD raised *sur place*. The issue was one of fairness to the applicants' in that they had not been provided with notice or an opportunity to address the *sur place* issue in *Jianzhu*.

[16] That the underlying issue is one of fairness not jurisdiction is reflected at paragraph 20 of the decision of Justice Michel Shore in *Ghamooshi v Canada (Citizenship and Immigration)*, 2016 FC 225: "This Court, in reading paragraph 111(1)(*b*) of the IRPA, has stated that the RAD, in and of itself, cannot raise a new issue, not determined by the RPD without further notice to the

parties (*Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896; *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 [*Jianzhu*])".

[17] Here the applicants raised the issue of *sur place* in their submissions to the RAD. It was reasonably open to the RAD to interpret subsection 111(2) of the IRPA as allowing it to address the issue – an interpretation that also aligns with the RAD's role, which is to "intervene when the RPD is wrong in law, in fact or in fact and law" (*Huruglica* at para 78).

[18] The RAD did not err in addressing the *sur place* issue on the appeal.

C. *Was the decision otherwise reasonable?*

[19] The RAD considered and confirmed most, but not all, of the RPD's negative credibility findings, concluding that the applicants' testimony did not reflect knowledge consistent with a Church practitioner of their profile. The RAD concluded on a balance of probabilities that the applicants' allegations that they were Church practitioners were not credible.

[20] The RAD recognized that the jurisprudence of this Court cautions against trivia-based religious questioning, but also noted that the jurisprudence allows for the assessment of religious based claims through thoughtful and prudent questioning of the applicants' religious knowledge. The RAD was reasonably satisfied that this is what occurred in this case.

[21] In considering the *sur place* claim, the RAD found on a balance of probabilities that the negative inferences, taken cumulatively, led to the conclusion that the applicants' knowledge was

inadequate to demonstrate that they are or were sincere practitioners either in this country or at any point in time and that they were not genuine practitioners of the Church in China. In light of these findings, the RAD found on a balance of probabilities that the applicants claim that they were Church of Almighty God practitioners in China was made to further a fraudulent refugee claim. The RAD notes that there is no persuasive evidence that the applicants' religious activities in Canada have come to the attention of the Chinese authorities or that they would be perceived as practitioners upon return to China.

[22] The applicants submit that the RAD erred in drawing negative findings based on their lack of knowledge of certain elements of the Church. The applicants submit it is impossible to establish an expectation of the level of knowledge of a member of the Church due to the divergence of beliefs and practices. The applicants further submit that the documentary evidence contains little information from the Church itself: "it is impossible to verify what a follower of the Church of Almighty God would believe, given the problems set out." The applicants argue the implausibility findings made were without an evidentiary basis. I do not agree.

[23] The RAD considered the RPD's credibility findings and reasonably concluded that the applicants' evidence relating to their knowledge of the Church was contrary to the documentary evidence. The RAD provided detailed reasons for these findings, referencing the documentary evidence and addressing instances where the documentary evidence could be viewed as contradictory of its findings. The RAD recognized that some conflicting information exists in relation to the Church and that there is a divergence in beliefs between the official Church and those in China. The RAD reasonably relied on the information relating to practitioners in China

as the applicants' evidence was that they identified as being practitioners from China for several years before coming to Canada. The RAD reasonably determined that the applicants' evidence was to be considered against the documentary evidence, not Church's English language website.

[24] Further, the applicants did not demonstrate that the contradictions between their testimony and the documentary evidence did not occur. Instead, the applicants asserted that the RPD and the RAD should have compared their testimony to the proposed new evidence. As previously noted, I conclude that the RAD reasonably did not admit the new evidence.

[25] The RAD's findings in turn reasonably support the findings on the *sur place* claim. The RAD assessed the claim in light of the evidence and its previous findings and found that the applicants joined a church in Canada to support a fraudulent claim. It was not unreasonable to conclude that there was insufficient evidence to establish the genuineness of their practice in Canada for the purpose of a *sur place* claim (*Su v Canada (Citizenship and Immigration)*, 2013 FC 518 at para 17).

[26] The RAD's decision is justified, transparent and intelligible (*Dunsmuir* at para 47).

IV. Certified Question

[27] The applicants have proposed the following question for certification:

> Does the RAD have the jurisdiction to make a determination on an issue in a claim where the RPD has not made any determination on said issue, and if so, in what circumstances?

[28] The applicants argued that the jurisprudence is unclear on this issue and that the Federal Court of Appeal in *Huruglica* did not address the question as the facts in that case involved a matter that had been previously determined by the RPD. Again, I disagree with the applicants.

[29] The Federal Court of Appeal has set out the test for certification of issues for the purposes of an appeal under paragraph 74(d) of the IRPA on a number of occasions (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 10-12; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9). These authorities establish that this Court may certify a question under paragraph 74(d) of the IRPA only where it (i) is dispositive of the appeal and (ii) transcends the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance.

[30] The question does not raise an issue of general importance. As noted in the applicants' representations in support of the proposed question, the Federal Court of Appeal set out the role of the RAD in paragraph 103 of *Huruglica*, where Justice Gauthier states:

> I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[31] I am unable to agree with the applicants' submissions that this statement leaves ambiguity or uncertainty with respect to the role of the RAD when reviewing a decision of the RPD. While *Jianzhu* indicates jurisdiction may not exist to consider a matter not previously determined by the RAD, *Jianzhu* was decided prior to the Federal Court of Appeal's decision in *Huruglica*. Further, *Jianzhu* has been relied upon in subsequent decisions of this Court as standing for the requirement of notice and the opportunity to make submissions where the RAD addresses an issue not previously determined by the RAD, not for the proposition that the RAD lacks jurisdiction to do so.

[32] I, therefore, conclude that the proposed question does not engage an issue of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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