Federal Court Cour fédérale

Date: 20180727

Docket: IMM-254-18

Citation: 2018 FC 779

Montréal, Quebec, July 27, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

SULING WU
QINGWEN HUANG

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by a Chinese couple who claim that authorities in China are seeking to arrest them as members of an unauthorized house church congregation. The Refugee Protection Division of the Immigration and Refugee Board of Canada denied the applicants' claim for asylum on the basis of a lack of credibility.

[2] The applicants' appeal to the Refugee Appeal Division (RAD) was dismissed. Relevant parts of the RAD's decision stated as follows:

1. Of the two elements of new evidence submitted by the applicants (a summons and a jail visiting card), only the jail visiting card was admitted;
2. The summons was excluded from evidence on the basis that it was not genuine; this finding was based on a conclusion that the summons was non-coercive, which made little sense for the authorities to use in the circumstances alleged by the applicants in which (i) fellow house church members had been arrested and subsequently sentenced to prison terms, (ii) the authorities had been vigorously pursuing the applicants, and (iii) the authorities had apparently allowed many months to go by without any other efforts to arrest the applicants;
3. No oral hearing was justified in relation to the only new evidence (the jail visiting card) because it did not meet the criterion in s. 110(6) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 that, if accepted, it would justify allowing or rejecting the refugee protection claim. The RAD found that the jail visiting card was not persuasive support of either (i) the applicants' association with a house church, or (ii) the Chinese authorities' efforts to arrest them;
4. With regard to the applicants' exit from China, the preponderance of the evidence indicates that it is not possible for wanted persons in the alleged circumstances to exit China by air using their own genuine passports, even with the assistance of a smuggler. The applicants were able to provide no more than vague speculation about what the smuggler allegedly did to assist them, and evidence of corruption in China does not extend to airport security;

5. With regard to the treatment of Christians in Guangdong province in China, evidence of recent crackdowns on unauthorized churches in China was not focused on Guangdong and there was no national trend to increased action against such churches and their members. The documentary evidence referred to some sanctions but no serious difficulties. If the events alleged by the applicants had actually happened, one would expect the documentary evidence to make mention of them.

I. Preliminary Issue: the Applicants' Unclean Hands

[3] The respondent argues that, regardless of the merits of the present application, it should be dismissed because the applicants lack clean hands. The parties agree that the applicants' removal from Canada was scheduled for April 15, 2018, that the applicants' motion for a stay of removal was dismissed by Order of Justice Luc Martineau dated April 14, 2018, and that the applicants failed to report for removal as ordered. A warrant was issued for the applicants' arrest on June 1, 2018.

[4] The parties agree that the decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*], provides guidance on this issue. At para 9, the Court stated that, where "an applicant has lied or is otherwise guilty of misconduct, a reviewing court may dismiss a judicial review application without proceeding to determine the merits" (emphasis in original), and may even decline to grant relief after having found reviewable error. At para 10, the Court stated:

> In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and,

> on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[5] Since one of the factors to be considered is "the apparent strength of the case", it is necessary to consider the merits of the case. I do so now before returning to this issue below.

II. Issues

[6] The applicants argue that the RAD erred in the following respects:

1. Finding the summons to be fraudulent without having a hearing to permit the parties to speak to the issue;
2. Finding that the applicants' exit from China was inconsistent with the preponderance of the documentary evidence;
3. Finding that the issuance of a non-coercive summons by the Chinese authorities was inconsistent with the preponderance of the documentary evidence; and
4. Finding that Christians are not subject to persecution in Guangdong.

III. Persecution of Christians in Guangdong

[7] It is helpful to begin with the last of the issues because, if the applicants are unlikely to be subject to persecution if returned to Guangdong, the other issues are less of a concern.

[8] The RAD's analysis of this issue was detailed, balanced and reasonable, covering 23 paragraphs of its decision. The RAD recognized that the treatment of Christians varies within China, but it reasonably focused on Guangdong province, and reasonably found that the situation there was not as alleged by the applicants. It did not fail to consider any relevant evidence on this issue. It was also reasonable for the RAD to conclude that, if events of the kind alleged by the applicants had actually happened, they would have been mentioned in the documentary evidence.

IV. Other Issues

[9] Having concluded that it was reasonable for the RAD to find that the actions of the Chinese authorities alleged by the applicants were inconsistent with the documentary evidence, it is easier to understand the context of the RAD's conclusions concerning the implausibility of (i) the Chinese authorities' use of a non-coercive summons, and (ii) the applicants' successful exit from a Chinese airport using their own genuine passports. Both of these events were likewise inconsistent with the preponderance of the documentary evidence. Though I recognize that findings of implausibility should not be made lightly, I am not convinced that the RAD's conclusions on these issues were unreasonable in the circumstances.

[10] I turn now to the RAD's refusal to hold a hearing in view of the conclusion that the summons the applicants submitted was not genuine. Having concluded that it was reasonable for the RAD to find the summons not to be genuine, it follows that there was no error in excluding the summons from the evidence, and hence no need to have a hearing to address the summons.

[11] The applicants argue that the RAD's treatment of the summons was unclear. Though the RAD indicated that the summons was excluded from the evidence, it cited (more than once in its reasons) the applicants' submission of a fraudulent document. The applicants argue that, if the summons were truly excluded from the evidence, nothing more would have been said of it in the decision. I disagree that this is necessarily the case. In my view, in the circumstances of this case, the RAD was entitled to cite the applicants' attempt to rely on a fraudulent document as new evidence without being required to hold a hearing to address that document.

V. Return to the Issue of the Applicants' Unclean Hands

[12] The extract above from *Thanabalasingham* provides four factors to be taken into account in deciding whether to dismiss the present judicial review application due to the applicants' misconduct:

1. The seriousness of the applicants' misconduct and the extent to which it undermines the proceeding in question;
2. The need to deter others from similar conduct;
3. The nature of the alleged administrative unlawfulness and the apparent strength of the case; and
4. The importance of the individual rights affected, and the likely impact upon the applicants if the administrative action impugned is allowed to stand.

[13] Justice Cecily Strickland had the following to say with regard to the seriousness of the applicants' misconduct in *Debnath v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 332 at para 25:

> In my view, it is clear that in these circumstances the Applicants come before this Court without clean hands. Despite a valid deportation order and the dismissal of their stay motion, the Applicants failed to report for removal and went into hiding to avoid removal. This misconduct was very serious and undermined the valid removal process and shows disregard for a decision of this Court…

[14] The same reasoning applies to the applicants in the present application. Their misconduct is very serious (and ongoing) and fundamentally undermines efforts to remove them from Canada.

[15] With regard to deterrence, it is evident that there is a need to deter others from similar conduct.

[16] Having found that the applicants' case in the present application is without merit, I conclude that the third factor listed above favours dismissal.

[17] The lack of merit in the present application is also relevant to the issue of the likely impact upon the applicant if the RAD's decision is allowed to stand. The reasonable finding of the RAD is that the applicants' individual rights are not seriously threatened. I note also that Justice Martineau's April 14, 2018 Order refusing to stay the applicants' removal found that they had not established any irreparable harm in the event of their return to China.

[18] In my view, all of the factors to be taken into account in deciding whether to dismiss the present application due to the applicants' misconduct favour dismissal.

VI. Conclusion

[19] The present application should be dismissed due to the applicants' misconduct. Alternatively, it should be dismissed on its merits.

[20] The parties agree that there is no serious question of general importance to certify.

JUDGMENT in IMM-254-18

THIS COURT'S JUDGMENT is that:

1. The present application is dismissed.

2. There is no serious question of general importance to certify.

"George R. Locke"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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