

Federal Court



Cour fédérale

Date: 20181115

Docket: IMM-2304-18

Citation: 2018 FC 1151

Ottawa, Ontario, November 15, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**XIAOFEI TAN
GUANGMING JIANG
JINHUI JIANG**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of the decision by the Refugee Protection Division of the Immigration and Refugee Board [the Board] dated March 5, 2018, that they are not convention refugees or persons in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicants, Xiaofei Tan [the Principal Applicant], her husband, Guangming Jiang, and their son, Jinhui Jiang [the Minor Applicant], are nationals of China.

[3] On or about June 2016, the Applicants engaged the services of a smuggler to help them obtain entry into Canada.

[4] The smuggler helped them obtain visas for the United States and Canada. The Applicants exited China accompanied by the smuggler, and travelled first by bus from Shenzhen to Hong Kong, and then by plane from Hong Kong to Los Angeles.

[5] On September 10, 2016, the Applicants and the smuggler flew from Los Angeles to Toronto. The Applicants claimed Canada's protection on November 2, 2016, in Toronto.

[6] The Applicants' refugee claim was heard on February 7, 2018, by a Member of the Board. The Member's decision was issued on March 5, 2018 [the Decision].

[7] The Board summarized the Applicants' version of events at paragraph 4 of the Decision:

[4] The claimants are a 45-year-old woman, her 48-year old husband, and their 20-year-old son who resided in Guangzhou, Guangdong Province. In the Basis of Claim (BOC) form signed September 29, 2016, the claimant alleges that she began practicing Falun Gong in December 2014 after she was introduced to the practice by a friend who thought it would improve the claimant's health. The claimant had recently been diagnosed with uterine fibrosis but wished to avoid surgery. She joined her friend's

practice group and began to feel better after a few months. When a medical check-up in June 2015 indicated that the tumours had reduced in size, the claimant told her husband, the male claimant, of the benefits of Falun gong, but he remained concerned about her safety and refused to join the practice group. The following June, the practice site was raided by the Public Security Bureau (PSB). The claimant managed to escape and went into hiding. She learned that PSB officers visited her home and returned with a summons for her arrest on June 13, 2016. The PSB also informed the male and associate claimants that six practitioners had been arrested; the following week, the family's vendor license was suspended, and the associate claimant was suspended from school. With the help of a smuggler, the three claimants obtained U.S. and Canadian tourist visas and left China for the United States on September 4, 2016, travelling from Shenzhen via Hong Kong to San Francisco. They boarded a flight from Los Angeles to Toronto and entered Canada on September 10, 2016. The claimants made their claims for Canada's protection inland on November 2, 2016 in Toronto.

[Footnotes omitted]

[8] The Board found that the determinative issue in the Applicants' refugee claim was their lack of credibility due to: (1) the Applicants' failure to submit the passports used to travel from China into evidence; (2) the Applicants' ability to exit China using their own passports despite allegedly being wanted by the Public Security Bureau [the PSB]; and (3) the Applicants adducing a summons by the PSB which the Board found was fraudulent.

[9] Additionally, in assessing the Principal Applicant's claim to be a Falun Gong practitioner, the Board questioned the Principal Applicant about her practice of Falun Gong, and concluded that she was not a genuine Falun Gong practitioner. The Board also reviewed evidence, consisting of pictures and a letter from a fellow practitioner, that the Principal Applicant had practiced Falun Gong in Canada, but assigned no weight to the evidence as the

Principal Applicant's face was not visible in the photographs, the letter was not a sworn statement, and the Board was unable to question the letter's author.

[10] The Board concluded that the Applicants had failed to establish on a balance of probabilities the central element of their claim, that the Principal Applicant is a Falun Gong practitioner wanted by the authorities in China.

[11] Therefore, the Board found that the Applicants are not Convention refugees or persons in need of protection, and their claims were rejected.

III. Issues

[12] The issues are:

- A. Did the Board err in finding that the Applicants were not credible?
- B. Did the Board err in its assessment of the Principal Applicant's identity as a Falun Gong practitioner in China and in Canada?

IV. Standard of Review

[13] The standard of review is reasonableness.

V. Analysis

A. *Did the Board err in finding that the Applicants were not credible?*

(1) Use of passports

[14] The Applicants did not submit the passports they used to travel from China into evidence, claiming that the smuggler they employed retained the passports upon their arrival in Toronto. The Principal Applicant told the Board that she followed the smuggler's instructions, and that the smuggler did not give a reason for retaining the passports.

[15] The Applicants submit that the Board erred in two respects, by relying on speculation related to the smuggler's reason for retention of the Applicants' passports and by not observing the presumption of truthfulness. The Applicants note that elsewhere in the Decision, the Board recognizes that the passports contain useful information, namely the Applicants' exit route out of China, and suggest that this offers one reason as to why the smuggler would want to retain the Applicants' passports.

[16] Moreover, the Applicants note that the Board correctly cited *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) [*Maldonado*] for the proposition that while statements given under oath are presumed to be true, that presumption can be rebutted by contradictions or inconsistencies. The Applicants submit that the Board erred in its application of this proposition, as the absence of the Applicants' passports is not an inconsistency and does not contradict the Applicants' testimony.

[17] The Board considered the testimony of the Principal Applicant, and concluded that the Applicants had not provided a reasonable explanation for their failure to submit their passports into evidence. This conclusion was reasonable. Even if I may disagree with the conclusion reached by the Board on this issue, the Board has a significant advantage in being able to hear live testimony and assess credibility, and it is not the role of this Court to re-weigh the evidence and substitute its own opinion.

[18] As well, the *Maldonado* presumption of truthfulness can be rebutted by contradictory evidence or findings that the testimony lacks credibility or plausibility. The Board rejected the Principal Applicant's explanation as unreasonable and drew a negative credibility inference as a result; this finding is reasonable and is sufficient to rebut the *Maldonado* presumption.

(2) Exit from China

[19] The Board found that if the PSB had made ongoing attempts to seek out the Principal Applicant, the Principal Applicant would not have been able to leave China using her own passport due to the Chinese Government's Golden Shield System, which limits the ability of citizens who have been convicted of crimes or are wanted by the authorities to exit the country. In reaching this conclusion, the Board acknowledged *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 at paragraph 72 [*Huang*], where Justice Russell wrote that issues of whether claimants are able to exit China with their own passports depend on the facts and evidence adduced in each case.

[20] The Applicants allege that the Board erred by failing to turn its mind to the specific facts of the Applicants' case, as is required by *Huang*.

[21] However, the Board engaged in a detailed analysis of both the Principal Applicant's testimony and the country specific evidence, and demonstrated an awareness of the specific facts of the Applicants' case. Moreover, while not determinative in all cases, proceeding unimpeded through Chinese exit controls may be inconsistent with being wanted by Chinese authorities, as well as being reasonably associated with negative credibility findings (*Zeng v Canada (Citizenship and Immigration)*, 2014 FC 1060 at paras 30-32; *Yan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 146 at paras 20-21).

(3) The summons

[22] The Principal Applicant provided the Board with a summons, dated June 13, 2016 [the Summons], which indicated that two PSB officers were sent to the Applicants' home on that date. The Board reasoned that because proceeding unimpeded through Chinese exit controls is inconsistent with being wanted by Chinese authorities, the veracity of the Summons was in question. The Board noted that the English translation of the Summons cites "No. 64" of the *Criminal Procedure Law of the People's Republic of China* and should therefore, according to the objective country documentary evidence, have listed the date and time at which the Principal Applicant was to appear. The Board also noted the Summons' simplicity - the Summons' only security feature is a red stamp - as well as the widespread availability of fraudulent documents in China. The Board weighed this evidence, concluded that the Applicants had submitted a false

document, and drew an adverse inference regarding the Principal Applicant's overall credibility as a witness.

[23] The Applicants make three arguments on this ground:

- i. the fact that fraudulent documents may exist in China does not lead to a finding that the Applicants' documents must also be fraudulent. However, the Board did not suggest that the prevalence of fraudulent documents in China led inexorably to a finding that the Summons is fraudulent. Rather, the prevalence of fraudulent documents was just one factor the Board considered in arriving at its conclusion;
- ii. the simplicity of the Summons has no connection to whether it is authentic. However, the Board reasonably noted at paragraph 23 of the Decision that the Summons' simplicity relates to the likelihood that it may be fraudulently created, not that it is necessarily so;
- iii. the Board made a mistake in finding that the Summons should have contained information about where and when the Principal Applicant needed to report, and therefore mistakenly concluded that the Summons is a criminal summons, which it is not.

[24] With respect to this last argument, the Applicants cite Item 9.10 of the National Documentation Package on China (30 October 2017) [the National Documentation Package] as stating that there are four types of summonses in China, including both the criminal summons and coercive summons. According to the National Documentation Package, while a criminal summons stipulates the time and place where the summoned individual is expected to report, a coercive summons does not. The Summons and the sample coercive summons in Item 9.10 of

the National Documentation Package also share the same title, further supporting the argument that the Summons is a coercive summons.

[25] The Applicants submit that this mistake of fact tainted the Board's assessment of the Summons, resulting in a reviewable error. The Applicants also submit that this error was determinative, because had the Summons been found to be authentic, it would have conclusively proven that the Principal Applicant was a person of interest to the PSB.

[26] Article 64 of the *Criminal Procedure Law* is located at Item 9.5 of the National Documentation Package. While the Board was correct in stating the Article 64 authorizes the issuance of a warrant "to compel the appearance of criminal suspect or defendant", the Board erred in reasoning that the language of Article 64 necessitates a criminal summons.

[27] Item 9.10 of the National Documentation Package contains samples of both coercive summons and criminal summons. Although the Board cited Item 9.10, the Board failed to consider the extensive similarities between the Summons and the sample coercive summons. In addition to sharing the same title, the Summons and the sample coercive summons also share the same substantive text; both authorize officers of the PSB to summon an individual. In contrast, the sample criminal summons contained in Item 9.10 requires the person being summoned to appear on their own (without an officer transporting the individual).

[28] The Board erred by assuming that Article 64 of the *Criminal Procedure Law* necessitates that the Summons must be a criminal summons, without considering the sample summonses in

the National Documentation Package which appear to strongly suggest that the Summons is a coercive summons. This erroneous analysis tainted much of the Board's analysis on other issues. The Board relied on the conclusion that the Summons was fraudulent to impeach the whole of the Principal Applicant's credibility, including her oral evidence at the hearing; absent this conclusion, the other findings on credibility may have differed. Because of this conclusion, the Board also placed no weight on other documentary evidence submitted by the Applicants, including a school suspension notice apparently showing that the Minor Applicant was suspended from school due to his mother's practice of Falun Gong.

[29] This finding requires a redetermination of this matter. Nevertheless, I have considered the second issue below.

B. *Did the Board err in its assessment of the Principal Applicant's identity as a Falun Gong practitioner in China and in Canada?*

[30] The Board reviewed the Principal Applicant's testimony, and concluded that she is not a genuine Falun Gong practitioner on the basis that she had failed to demonstrate an understanding of the fundamental teachings of Falun Gong. The Board also reviewed evidence of the Principal Applicant practicing Falun Gong in Canada with respect to the *sur place* claim, namely photographs of her engaged in practice and a letter of support from a fellow practitioner. However, the Board assigned no weight to this evidence as the Principal Applicant's face was not visible in the photographs, the letter was not a sworn statement, and the Board was unable to question the letter's author. The Board concluded that the Principal Applicant is not a genuinely committed Falun Gong practitioner.

[31] The Applicants submit that the Board erred by engaging in an impermissible and microscopic examination of a claimant's faith system, as well as by holding the Principal Applicant to a level of Falun Gong knowledge that is neither transparent nor justifiable.

[32] I disagree. I do not find that the Board imposed too high a standard for the Principal Applicant's knowledge of the practice and principles of Falun Gong, and the basic knowledge inquiries relating to key principles were reasonable. It is not the role of this Court to reassess the evidence and to substitute its opinion for that of the Board.

JUDGMENT IN IMM-2304-18

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter is remitted to a differently constituted Board for reconsideration in accordance with these reasons;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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