

Federal Court



Cour fédérale

**Date: 20181210**

**Docket: IMM-1739-18**

**Citation: 2018 FC 1237**

**Ottawa, Ontario, December 10, 2018**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**HAOWEN ZHANG  
HAIFEN ZENG  
YUN ZHANG**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Principal Applicant, Mr. Haowen Zhang, his wife, Ms. Haifen Zeng, and their minor child, Yun Zhang, are Chinese citizens. The adult Applicants claim they have a well-founded fear of persecution by the communist regime in China because of their practice of Falun Gong and, if returned to China, Ms. Zeng will be forced to use an intrauterine device since they now have a second child who was born in Canada after their arrival.

[2] The Applicants arrived in Canada on November 17, 2012, and ten days later claimed refugee protection. In an oral decision rendered on March 5, 2018, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected their claims, finding that the adult Applicants were not and have never been genuine Falun Gong practitioners. They have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], for judicial review of the RPD's decision. They ask the Court to set aside the decision and return the matter for redetermination by another member of the RPD.

I. The RPD's Decision

[3] The RPD found the adult Applicants were not and have never been genuine Falun Gong practitioners. After noting they each had 12 years of formal education and had stated that they had read Master Li's book, *Zhuan Falun*, the RPD tested their knowledge of Falun Gong through a series of questions and, in the case of Ms. Zeng, asked her to perform the first exercise.

[4] The RPD stated that Ms. Zeng's answer as to what she was to imagine herself being in exercise number three was "incorrect" because she had responded: "An empty barrel reaching to heaven and to the bottom of the Earth," when the correct answer, according to the RPD, was two empty barrels reaching from heaven to Earth. The RPD then questioned Ms. Zeng about the five benefits of Falun Gong, finding that while she did mention improving health, the "correct answer," according to the RPD, also included a higher mind, a balanced psychological state, freedom from restlessness and impatience, and a higher state of morality.

[5] The RPD also questioned Ms. Zeng about transcending the five elements. In this regard, the RPD stated:

She answered it was to reach a high level. But the correct answer is that the body stops aging.

The female claimant was unable to recite verses. She was only able to recite two lines of the first verse, but nothing for the fourth verse at all. Master Li has indicated that the verses are to be recited prior to performing the exercises.

[6] The RPD asked Ms. Zeng to demonstrate the first exercise and to name each movement as she did so. The RPD found that, while she did perform most of the first exercise, she failed to do any of the stretching required, could only name some of the movements, and had not “overlapped her hands at the end of the exercise correctly.” When asked as to why she could not perform the exercise correctly, Ms. Zeng indicated that she was nervous; the RPD pointed out to her though, that she would have performed these exercises and verses hundreds and hundreds of times if she had been practicing Falun Gong daily for over seven years.

[7] The RPD found Mr. Zhang was unable to recite the third line of the verse for the third exercise “correctly”. When asked as to why he was unable to recite the verse correctly, Mr. Zhang said he was nervous and there is an order he would go through in practicing Falun Gong exercises; the RPD pointed out to him though, that he had been practicing Falun Gong for over six years and would have performed and recited these verses hundreds and hundreds of times.

[8] The RPD further found that Mr. Zhang’s response to a question concerning what Master Li talked about in the second talk of Zhuan Falun was “incorrect.” The RPD stated: “The correct

answer is concerning illness. Practitioners of Falun Gong are not allowed to treat illness, because if you do you are unable to practice cultivation and you would have too much karma.”

[9] The RPD thus found the adult Applicants were not genuine Falun Gong practitioners, whether in China or in Canada. The RPD continued by stating it was:

[...] cognizant of the Federal Court jurisprudence which cautions against determining religious identity on the basis of a refugee’s religious knowledge or lack thereof. However, it is important to recognise that unlike in religions in general, which are faith-based, the objective evidence establishes that knowledge is an important component of Falun Gong.

The foundation of Falun Gong consists of a body of fundamental knowledge essential for the tasks of undertaking proper cultivation towards higher stages of attainment. It comprises Master Li’s teachings, collected in a number of books, the most important being Zhuan Falun. Any knowledge that the principal claimant and the female claimant have learned about Falun Gong could easily have been learned here, over the internet.

[10] The RPD gave the letters from individuals attesting to the adult Applicants’ practice of Falun Gong no weight as the authors of the letters were not present at the hearing to assess the veracity of their statements. The RPD also gave no weight to the photographs of the adult Applicants practicing Falun Gong in Canada, noting that they were taken in public places to “bolster fraudulent claims.”

[11] With respect to Ms. Zeng’s fear of being forced to wear an intrauterine device [IUD] if returned to China, since she now has two children and had indicated she wants more children, the RPD found that wanting more children was speculative and being forced to wear an IUD if she

returned to China would not happen because a child born in Canada is not counted in family planning in China.

[12] Based on the totality of the evidence, the RPD concluded by stating that the Applicants were neither Convention refugees nor persons in need of protection, and therefore rejected their claims.

## II. Analysis

[13] Although the Applicants have raised several discrete issues concerning the RPD's decision, these issues are, in my view, subsumed by an over-arching issue; that is, was the RPD's decision reasonable?

### A. *Standard of Review*

[14] The standard of review for credibility findings by the RPD is that of reasonableness with considerable deference owed to the advantageous position of the trier of fact (*Cambara v Canada (Citizenship and Immigration)*, 2017 FC 1019 at para 13, 286 ACWS (3d) 531; *Aguebor v (Canada) Minister of Employment and Immigration*), [1993] FCJ No 732 at para 4, 160 NR 315 (CA)).

[15] The reasonableness standard tasks the Court with reviewing an administrative decision for “the existence of justification, transparency and intelligibility within the decision-making process” and determining “whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Those criteria are met if “the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

[16] Additionally, so long as “the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome”; nor is it “the function of the reviewing court to reweigh the evidence” (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339).

#### B. *The Parties’ Submissions*

[17] The Applicants say the RPD erred in finding that the adult Applicants failed to establish their identities as Falun Gong practitioners. The Applicants criticize the RPD’s conclusion that “the objective evidence establishes that knowledge is an important component of Falun Gong” without citing any specific evidence to support this. In the Applicants’ view, the RPD rejected some of the adult Applicants’ responses as being incorrect even though they largely conveyed the same notion as the correct response.

[18] According to the Applicants, the RPD failed to properly examine the letters of support from fellow Falun Gong practitioners, since one of the letters was from an old colleague of Ms.

Zeng who had been punished by the Public Security Bureau in China and could therefore not attend the hearing. As for the other letters, the Applicants complain that the RPD did not notify them that their witnesses had to attend the hearing. In the Applicants' view, the RPD erroneously rejected the photographs based on negative credibility findings on the adult Applicants' knowledge of Falun Gong.

[19] The Applicants note that the RPD cited no documentary evidence to support its finding that children born abroad are not counted under China's family planning policy. According to the Applicants, parents who have a child born abroad must still register the child on their hukou in order for the child to be able to go to school and to be eligible for citizenship. The Applicants contend that the family planning policy would apply in respect of their Canadian born child, and that they would be prevented from having another child. The Applicants say the documentary evidence shows Ms. Zeng would be forced to wear an IUD or even undergo sterilization since they already have two children.

[20] The Applicants contend that, because of its erroneous conclusion that the adult Applicants had not established their identities as Falun Gong practitioners, the RPD further erred by failing to assess their *sur place* claims and not considering the real possibility that they could be in danger in China as a result of their public involvement in Falun Gong in Canada.

[21] The Respondent says it was reasonable for the RPD to find the adult Applicants lacked credibility in view of the deficiencies in their knowledge of Falun Gong, and that many of their answers were well outside the realm of what one would expect from dedicated practitioners. In

the Respondent's view, the evidence provided by the adult Applicants was not capable of overcoming the credibility concerns noted by the RPD since their knowledge of Falun Gong was incompatible with their claimed experience.

[22] The Respondent maintains that it was reasonable for the RPD to conclude that the Applicants' claim was fabricated. According to the Respondent, the adult Applicants' second child was not born in contravention of China's two-child policy and, therefore, it is unlikely they would face any repercussions from the family planning authorities.

[23] The Respondent says the RPD was not required to consider the Applicants' *sur place* claim because, not only was there no evidence that they raised this issue before the RPD, but also, they did not submit any evidence upon which a *sur place* claim could have been grounded.

C. *The RPD's Decision is Unreasonable*

[24] In my view, the RPD's decision must be set aside because it suffers from two defects which render it unreasonable.

[25] First, the RPD unreasonably determined that the adult Applicants were not and never have been genuine Falun Gong practitioners. The RPD assessed their knowledge and practice of Falun Gong on a standard of correctness, rather than upon the sincerity or genuineness of their beliefs and practices.



[26] In assessing a claimant's beliefs or practices, the RPD should not adopt an unrealistically high standard of knowledge or focus on a few points of error or misunderstandings to a level which reaches a microscopic analysis (see: *Zhang v Canada (Citizenship and Immigration)*, 2012 FC 503 at para 12, 409 FTR 264, and the cases cited therein). Moreover, case law has established that the RPD's assessment of a claimant's beliefs or practices will be unreasonable where, as in this case, it expects answers to questions about a claimant's beliefs to be equivalent to the RPD's own knowledge (see: *Ullah v Canada (Minister of Citizenship and Immigration)*, 2000 FCJ No 1918 at para 11, 101 ACWS (3d) 792).

[27] The RPD is tasked with assessing a claimant's credibility and not the soundness or correctness of his or her beliefs or practices. A claimant may have a poor understanding of the minutiae of a doctrine, but that does not necessarily mean the claimant's beliefs or practices are not genuine or sincere (*Wang v Canada (Citizenship and Immigration)*, 2012 FC 346 at para 9, 214 ACWS (3d) 558). The RPD's questioning of a claimant about their beliefs or practices will be defensible only if it goes to questions which focus on the sincerity of the beliefs or practices. A finding of a lack of genuinely or sincerely held belief is to be founded, not on the correctness of the answers but, rather, on a claimant's inconsistent, vague, non-responsive or contradictory answers to such questions.

[28] The RPD in this case reached its conclusion that the adult Applicants were not and never have been genuine Falun Gong practitioners by assessing the correctness of their responses to questions about Falun Gong doctrine and, in the case of Ms. Zeng, her inability to correctly perform the first exercise. The RPD did not look to the sincerity of their beliefs and practice.

[29] It is apparent from the RPD's reasons and its questioning of the adult Applicants that it may have had a specialized knowledge of Falun Gong, since it expected the adult Applicants' answers to questions about Falun Gong to be equivalent to its own knowledge based on similar claims or evidence presented in other cases. If so, the RPD should have disclosed that specialized knowledge to the Applicants according to Rule 22 of the *Refugee Protection Division Rules*, SOR/2012-256, and paragraph 170(i) of the *IRPA*.

[30] The second reason why the RPD's decision is unreasonable is that it did not consider or state anything at all about the possibility of the Applicants having a *sur place* claim.

[31] I disagree with the Respondent that the RPD did not have to consider the Applicants' *sur place* claim since there was no evidence that the Applicants raised this issue before the RPD. In *Mohajery v Canada (Citizenship and Immigration)*, 2007 FC 185 at para 31, [2007] FCJ No 252, the Court determined that "the issue of a *sur place* refugee claim must be examined insofar as it perceptibly emerges from the evidence on the record that the activities liable to entail negative consequences in case of a return, took place in Canada. This must be done even though the applicants did not specifically ask the Board to proceed with such an analysis."

[32] Since the RPD's decision is unreasonable for the reasons stated above, I need not address the other submissions as to its assessment of the letters or photographs, or whether Ms. Zeng would or would not run afoul of the family planning policies in China.

III. Conclusion

[33] The Applicants' application for judicial review is allowed. The RPD unreasonably assessed whether the adult Applicants were or were not genuine practitioners of Falun Gong and did not address whether the Applicants did or did not have a *sur place* claim.

[34] Neither party raised a serious question of general importance; so, no such question is certified.

**JUDGMENT in IMM-1739-18**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is allowed; the decision of the Refugee Protection Division of the Immigration and Refugee Board rendered on March 5, 2018, is set aside; the matter is returned for redetermination by a different member of the Refugee Protection Division of the Immigration and Refugee Board in accordance with the reasons for this Judgment; and no question of general importance is certified.

"Keith M. Boswell"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1739-18

**STYLE OF CAUSE:** HAOWEN ZHANG, HAIFEN ZENG, YUN ZHANG v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 7, 2018

**JUDGMENT AND REASONS:** BOSWELL J.

**DATED:** DECEMBER 10, 2018

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