Federal Court  Cour fédérale

Date: 20190313

Docket: IMM-955-18

Citation: 2019 FC 307

Ottawa, Ontario, March 13, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

XIAO LIANG LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Xiao Liang Li, is a citizen of the People's Republic of China. Shortly after arriving in Canada in April 2011, he claimed refugee protection on the basis of his fear as a Christian of persecution in China. Following a hearing before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on January 29, 2018, the applicant's claim was rejected for written reasons dated February 6, 2018. The applicant now

applies for judicial review of this decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the following reasons, this application for judicial review is allowed.

II. BACKGROUND

[3] The applicant was born in November 1971 in Tian Jin, People's Republic of China. He was married in June 2000.

[4] The applicant and his wife have a daughter who was born in July 2005. According to the applicant, his wife became pregnant again in the summer of 2009. Local birth control officers discovered this pregnancy and forced the applicant's wife to undergo an abortion in September 2009. The applicant states that he was despondent over the loss of his unborn son. At the suggestion of a friend, in November 2009 the applicant began attending an underground Christian house church. After that, he attended services every week. The applicant found that this brought meaning and happiness back into his life. He was baptized in June 2010. He encouraged his parents and his wife to join the church as well but they were not interested.

[5] The applicant states that on January 9, 2011, the Public Security Bureau [PSB] raided the house church while he and others were attending a service. Those in attendance were alerted to the raid by a telephone call from a lookout who was stationed down the road. According to the applicant's narrative, "[e]veryone then began to escape from the house according to the plan made beforehand." The applicant himself "managed to flee the premises and went to [his]

distant cousin's home to hide." While in hiding, the applicant learned that the PSB had been to his home and to his parents' home looking for him. On January 12, 2011, the PSB left a summons for him at his home. With the assistance of a smuggler, the applicant fled China for Canada via South Korea. The applicant travelled on his own passport, which was surrendered to Citizenship and Immigration Canada when he made his refugee claim.

[6] The applicant testified that since arriving in Canada, he has attended the Living Water Assembly in Toronto every week. The applicant tendered various documents relating to his involvement with this church, including a Certificate of Baptism dated August 20, 2011, and a letter from Reverend David Ko.

III. DECISION UNDER REVIEW

[7] The RPD member accepted the applicant's personal identity as a citizen of China. However, the member rejected the claim for the following reasons:

- The member found on a balance of probabilities that the applicant never belonged to an underground Christian church in China.
- The member did not accept that the PSB had raided a house church service the applicant was attending.
- The member found that the summons tendered by the applicant was not authentic.
- The applicant's account of his departure from China was inconsistent with his claim to be wanted by Chinese authorities.

- The member found that the applicant had not been a genuine practicing Christian since coming to Canada.

IV. STANDARD OF REVIEW

[8] It is well established that this Court reviews the RPD's assessment of the evidence before it on a reasonableness standard (*Hou v Canada (Citizenship and Immigration)*, 2012 FC 993 at paras 6-15 [*Hou*]). This standard applies to the RPD's factual findings, including its credibility determinations (*Nweke v Canada (Citizenship and Immigration*), 2017 FC 242 at para 17), findings concerning the genuineness of documents, and its interpretation of documentary evidence (*Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 21).

[9] It is also well established that this Court should show significant deference to the RPD's credibility findings (*Su v Canada (Citizenship and Immigration)*, 2013 FC 518 at para 7). This is because the RPD is well-placed to assess credibility (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (FCA) at para 4 (QL); *Hou* at para 7). It has the advantage of observing the witnesses who testify and may have expertise in the subject matter that the reviewing court does not share, including with respect to country conditions (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42; *Zhou v Canada (Citizenship and Immigration)*, 2015 FC 821 at para 58). Nevertheless, the reviewing court must ensure that the RPD's credibility findings are reasonable.

[10] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v*

Igloo Vikski Inc, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "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). These 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). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

V. ANALYSIS

[11] The RPD member relied on several elements in finding that the applicant is not credible. With the exception of the finding that the applicant had not practiced as a genuine Christian since coming to Canada, the applicant takes issue with all the specific findings set out in paragraph 7, above. The applicant contends that each of these findings is unreasonable, leading to a result which cannot stand on judicial review. While I do not accept all of the applicant's submissions, I agree that several critical elements of the member's analysis are flawed and that, considered as a whole, the decision is unreasonable.

[12] Looking first at the applicant's claim to have been a practicing Christian in China, on the evidence before her, it was open to the member to find that the applicant had failed to meet his

burden of establishing that he belonged to an underground Christian church in China. Unless the decision-maker has imposed an unduly stringent test or engaged in a microscopic analysis of the claimant's evidence in assessing the genuineness of professed religious beliefs and practices, this is the sort of determination to which a reviewing court generally should show deference (cf. *Lin v Canada (Citizenship and Immigration)*, 2012 FC 288 at paras 59-61; *Wang v Canada (Citizenship and Immigration)*, 2018 FC 668 at para 37; and *Bushra v Canada (Citizenship and Immigration)*, 2018 FC 896 at paras 22-24).

[13] In the present case, the applicant claimed to have attended the underground Christian church every week for over a year. He was given a Bible as a gift the second time he attended. Despite this exposure, when questioned by the member the applicant offered only a generic account of the church's practices. The member was particularly concerned that the applicant had not mentioned prayer as one of the church's practices until she asked him about this directly. When asked why he had not mentioned prayer earlier, the applicant apologized and said he was nervous. The member rejected this explanation because "prayers are a central aspect to any Christian church." It was apparent from the applicant's narrative that he understood prayer to be a central part of the church's practices yet when asked about the church's practices he did not volunteer this but instead only mentioned arguably less central activities (e.g. distributing leaflets). Against this backdrop, it was open to the member to find that this omission was not due to nervousness, as the applicant claimed.

[14] However, the member did not simply reject the applicant's explanation. She held that it was more likely than not that the applicant had never been a member of an underground

Christian church in China. In my view, it was unreasonable for the member to treat this single deficiency of the applicant's evidence as grounds for drawing the affirmative conclusion (on a balance of probabilities) that the applicant was never a member of an underground Christian church in China. Without more, a reason for finding that the applicant had not met his burden to establish his claim for protection is not a reason to believe the opposite of what the applicant is claiming.

[15] Further, while it may ultimately have been open to the member to disbelieve the applicant's account of the PSB raid on the house church, the member's reasons for this key determination lack justification, transparency and intelligibility. While not expressed in precisely these terms, it is clear that the member considered the applicant's claim that he was able to escape out the back door because the PSB had not secured that exit to be implausible. The member stated: "If the PSB were going to raid this underground church, they would have surrounded the building and not simply go to the front door so people could run out the back door." The applicant contends that this is pure speculation on the part of the member. While the member's statement may have been overly categorical in the absence of evidence concerning the tactical methods of the PSB, as a matter of common sense this was a relevant consideration. Moreover, the applicant did not assist his own cause when he himself offered various explanations for why the PSB did not secure the back door, suggesting variously that the road behind the house was one way in the wrong direction, that there was a ditch in the way, that the hill behind the house was too steep for them to climb down, and that the PSB would not have known that the house could be approached from that direction. The real difficulty, however, is that the member did not address the most obvious explanation for why the applicant and others

were able to get away through the back door: they were tipped off about the raid and made their escape before the PSB had a chance to set up a secure perimeter around the house. A reasonable decision-maker is not bound to accept this explanation, but in the circumstances of this case it had to be addressed.

[16] Turning to the PSB summons tendered by the applicant, the member found that it was not genuine and, as a result, could not corroborate the applicant's claim. In my view, the member's analysis of this item of evidence also lacks justification, transparency and intelligibility. I say this for two reasons.

[17] First, the member observes that the document itself indicates that it is an "Arrest Summons" but then notes that there is no evidence in the National Documentation Package [NDP] for China that the PSB uses something with that name. Of course, the member was comparing English translations of Chinese documents. The type of document in question is a *juchuan* (or *juzhuan*). As can be seen in the NDP, this term is often translated as "Coercive Summons." However, the member never considers whether the summons left for the applicant had the same name in Chinese as the examples included in the NDP but had been translated into English differently in this case – i.e. as "Arrest Summons" as opposed to "Coercive Summons." No one appears to have thought to ask the interpreter who was present about this. It is also noteworthy that *juchuan* has been translated as "Arrest Summons" in other cases without attracting comment (see, for example, *Ye v Canada (Citizenship and Immigration)*, 2012 FC 1381; *Cai v Canada (Citizenship and Immigration)*, 2015 FC 577; *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 [*Chen*]; *Cao v Canada (Citizenship and Immigration)*, 2015 FC

315; and *Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 [*Ren*]). In fairness to the member, counsel for the applicant provided her with little assistance on this point.

[18] Second, the member notes that "overall credibility may affect the weight given to the documentary evidence," citing *Huang v Canada (Citizenship and Immigration)*, 2011 FC 288 at paras 21-22. While this is no doubt true as a general proposition, adverse overall credibility findings alone are not sufficient grounds for rejecting potentially corroborative evidence. Such evidence must be examined independently of concerns about the claimant's credibility before it can be rejected (*Yu v Canada (Citizenship and Immigration*), 2015 FC 1138 at paras 31-37; *Lu v Canada (Citizenship and Immigration)*, 2016 FC 846 at paras 33-35; and *Ren* at para 27). Otherwise, the decision maker risks reasoning in a way that begs the very question at issue: the corroborative evidence is not believed simply because the claimant is not believed (*Sterling v Canada (Citizenship and Immigration)*, 2016 FC 329 at para 12). Moreover, as Justice Rennie (as he then was) stated in *Chen*: "It is impermissible to reach a conclusion based on certain evidence and dismiss the remaining evidence as inconsistent with that conclusion" (at para 20). Here, the member did not conduct the requisite analysis before rejecting the summons; instead, she simply relied on her prior finding that the applicant was not a member of an underground church in China. In addition to the problems with this determination discussed above, it was made without regard to the potentially corroborative evidence. It is true that the member also notes that she was "mindful of the presence of fraudulent documents from the People's Republic of China [footnote omitted]." While this latter consideration may be relevant, it is far from a sufficient reason to find that a document is not genuine (*Lin v Canada (Citizenship and Immigration)*, 2012 FC 157 at paras 53-55).

[19] Finally, I agree with the applicant that the member's conclusions regarding how the applicant left China are unreasonable. Having regard to Decision TB6-11632 of the Refugee Appeal Division dated November 30, 2016, concerning the operation of the Golden Shield system (which has been identified by the Chairperson of the IRB as a Jurisprudential Guide), there is no question that whether the applicant could have left China using his genuine passport if he was wanted by the authorities is an important issue. If the applicant did leave China using his own passport, this could suggest that he was not wanted by Chinese authorities, unless the applicant could provide a satisfactory account of how he managed to evade the exit controls (cf. *Ren* at para 16; *Yang v Canada (Citizenship and Immigration)*, 2016 FC 543 at paras 12-14; *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 at para 68; and *Huang v Canada (Citizenship and Immigration)*, 2019 FC 148 at para 36).

[20] Unfortunately, the member's reasoning on this critical point is opaque at best. The member stated: "I find that the claimant could not have successfully left the People's Republic of China in the manner he has described of showing his passport to one Chinese official who stamped, scanned or examined it and then was able to board a plane." The member also stated: "In the current case, given the claimant's lack of credibility of being a member of an underground Christian church, I find it unlikely that he was smuggled out of the country." The member then continued: "I therefore find, on a balance of probabilities, that the claimant did not leave the People's Republic of China as he described using his own genuine Chinese passport. I therefore find that the claimant is not being sought by the Chinese authorities for being a member of an underground Christian church."

[21] While it is less than clear, the member appears to have found that the applicant did not use his genuine passport in the somewhat lax way he described in his testimony; rather, he exited in the normal course, being subjected to all the checks entailed by the Golden Shield system that were in place at the time. The fact that he was able to leave China therefore suggested that, contrary to the applicant's allegation, he was not wanted by the authorities. Such reasoning may be valid, provided there are sound reasons for rejecting the alternative explanation that the applicant was wanted but he was able to leave using his genuine passport despite the Golden Shield because he was assisted successfully by a smuggler. Here, however, the member rejected this alternative explanation because, having already found that the applicant was not wanted by the authorities, she found that there was no reason for him to have used a smuggler in the first place. Laid bare in this way, the circularity of the member's reasoning is obvious.

VI. CONCLUSION

[22] It may be tempting to think that since the member could reasonably have concluded that the applicant had not established that he was a practicing Christian in China, the ultimate conclusion that the applicant is not a Convention refugee under section 96 of the *IRPA* or a person in need of protection under section 97 is reasonable. However, to uphold the decision on this basis would be to wade impermissibly into the merits of the applicant's claim for protection. The case turned entirely on the applicant's credibility. The flaws in the member's decision I have identified above go to the heart of the case. The applicant is entitled to have the credibility of his claim assessed in all respects in a logically and legally sound manner. There must, therefore, be a new hearing.

[23] The parties have not suggested any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-955-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated February 6, 2018, is set aside and the matter is remitted for reconsideration by a differently constituted panel.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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