

Federal Court



Cour fédérale

Date: 20190319

Docket: IMM-904-18

Citation: 2019 FC 334

Ottawa, Ontario, March 19, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

QIHAO CHEN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Qihao Chen, is a citizen of the People's Republic of China. He was born in Fuzhou City, Fujian Province, in May 1989.

[2] The applicant left China on a U.S. student visa in December 2010. He studied at Weber State University in Utah until December 2014, when he graduated with a Bachelor of Arts degree in Geography.

[3] On April 30, 2015, the applicant crossed the Canada/U.S. border irregularly to meet up with a woman he had met on-line. The woman was a permanent resident of Canada. Their relationship ended in June 2015 but the applicant remained in Canada illegally.

[4] The applicant was arrested by Canadian immigration officials in February 2017. He was ordered released on conditions by the Immigration and Refugee Board of Canada [IRB] a few months later.

[5] While he was in immigration detention, the applicant submitted a claim for refugee protection. The basis of his claim was that, since he had been living in Canada, he had become a Pentecostal Christian and, as such, he had a well-founded fear of persecution in China. The applicant acknowledged that he had not been a Christian when he was living in China and that he had not had any problems with the authorities there at that time. According to the applicant, he began attending the Living Stone Assembly church in Toronto in July 2015 and had been attending services regularly ever since.

[6] The applicant's claim was heard by the Refugee Protection Division [RPD] of the IRB on May 2, 2017. Along with general country condition evidence and his own first-person narrative, the applicant tendered a letter dated January 28, 2017, from Reverend David Ko, pastor of the

Living Stone Assembly church, and an affidavit sworn by Hong Wu Li on May 1, 2017, in support of his claim. Reverend Ko's letter addressed the applicant's Christian beliefs and practices and the circumstances of Christians in China. Mr. Li's affidavit set out that he and the applicant had been friends in China and had reconnected after the applicant came to Canada. Mr. Li had been accepted by Canada as a refugee in 2008 on the basis of the persecution he faced as a Christian should he return to China. Mr. Li had attended a house church in China that was raided and he was wanted by Chinese authorities. He had lived in Canada since 2007. It was Mr. Li who introduced the applicant to the Living Stone Assembly church.

[7] For reasons dated May 24, 2017, the RPD rejected the claim. The applicant appealed this decision to the Refugee Appeal Division [RAD] of the IRB. For reasons dated January 26, 2018, the RAD dismissed the appeal. The applicant now applies for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. DECISION OF THE RPD

[8] The RPD was satisfied that the applicant had established his identity as a citizen of China. The RPD also found that the applicant was a practicing Pentecostal Christian. The RPD concluded, however, that the applicant had not met his burden of establishing a serious possibility of persecution on a Convention ground or that, on a balance of probabilities, he would be personally subjected to a danger of torture or face a risk to life or a risk of cruel and unusual treatment or punishment if he were to return to China. The RPD therefore concluded that the

applicant was not entitled to refugee protection under section 96 of the *IRPA*, nor was he a person in need of protection under section 97 of that Act.

[9] The determinative issues for the RPD were the credibility of the applicant's claim to fear persecution in China and whether such a fear was well-founded. With respect to the applicant's claim to fear persecution in China, the RPD concluded that the applicant's failure to seek refugee protection in Canada for almost two years was "not demonstrative of a genuine subjective fear of returning to China." With respect to whether there was an objective basis for a fear of persecution, on the basis of its assessment of the country condition evidence before it, the RPD found "on a balance of probabilities that should the [applicant] wish to worship upon return to China, there are many congregations he could attend without attracting the interest of authorities."

III. DECISION OF THE RAD

[10] The applicant appealed the decision of the RPD to the RAD. He did not request a hearing before the RAD but he did tender new evidence in the form of a second letter from Reverend Ko, dated June 11, 2017. In written submissions, the applicant argued that the RAD's intervention was warranted because the RPD erred in its assessment of the applicant's credibility and in its assessment of the current conditions in China for Christians.

[11] In summary, the June 11, 2017, letter from Reverend Ko stated the following:

- The applicant continued to be an active member of the Living Stone Assembly church, which he had been attending for almost two years.

- There is true religious freedom in Canada but not in China.
- Christians who practice outside government-controlled churches in China risk punishment from the Chinese authorities.
- There has been a nationwide crackdown on unauthorized house churches “in the last few years.”
- “The situation for unauthorized Churches and their members is getting worse.”
- As a matter of religious conviction, the applicant would not attend a government-controlled church in China, a position Reverend Ko supports.
- If the applicant were to return to China, he would not be permitted to stay in touch with the Living Stone Assembly. According to Reverend Ko, this “is another violation of [the applicant’s] human right to religious freedom.”

[12] The RAD did not admit the letter because, while it post-dated the applicant’s refugee hearing, the information contained in it was not new. The RAD found that the information provided in the letter was already reflected in the documents the applicant had submitted to the RPD and in the RPD’s National Documentation Package [NDP] for China.

[13] With respect to the grounds of appeal advanced by the applicant, the RAD reviewed them under a correctness standard in accordance with the direction provided by the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], with the exception of issues involving the credibility of oral testimony. On such issues, the member

stated that she would apply a standard of reasonableness when the RPD enjoyed a meaningful advantage over the RAD.

[14] On the issue of the significance the RPD attributed to the applicant's delay in seeking refugee protection in Canada, the RAD held that the RPD "did not err in taking a negative credibility inference from the two-year delay in claiming refugee protection in Canada." The RAD emphasized the following in its assessment of this issue:

- The applicant was aware from his friends and his church pastor that Christians like himself suffer persecution in China.
- The applicant was in Canada illegally and could have been arrested and returned to China at any time.
- The applicant had been told by a travel agent in the U.S. that it would be difficult for him to get a visa in Canada. He had also been told by friends and fellow churchgoers that he could not apply for refugee protection in Canada if he had not suffered persecution himself in China. The applicant did not seek out any other information on how to regularize his status in Canada until he was arrested.
- Given the applicant's education and personal situation, "it is reasonable to expect that he would have the motivation and ability to research refugee protection and visa requirements on his own, instead of relying completely upon the advice of individuals who did not have expertise in the field of immigration and refugee law." The RAD member stated that she agreed with the RPD that the applicant's "explanation for not

seeking out information beyond what he was told by his friends and fellow churchgoers is not reasonable.”

[15] Considering this, the RAD found that the RPD “did not err in rejecting [the applicant’s] explanation and drawing a negative credibility inference from [the applicant’s] two-year delay in making a claim for refugee protection in Canada.”

[16] With respect to whether the applicant’s fear of persecution in China was objectively well-founded, the RAD concluded that the RPD did not err when it determined, on a balance of probabilities, that the applicant would be able to practice his religion in his home province of Fujian, that he would be able to worship in a Christian congregation of his own choosing, and that, even if he attended an unauthorized church, there was not a serious possibility that he would be persecuted for doing so. In reaching this conclusion, the RAD relied on its own assessment of the country condition evidence before it. The RAD considered the letter from Reverend Ko dated January 28, 2017, which simply asserted that Christians in China were persecuted, but gave it little weight as it was brief and did not relate specifically to Fujian Province. Similarly, the RAD gave little weight to Mr. Li’s affidavit because his knowledge of the situation in Fujian Province was dated. The RAD found that those forms of Christianity that were the targets of persecution in China generally have been designated as “evil cults,” which was not the case with the form of Christianity the applicant wished to practice. The RAD found that the preponderance of the evidence indicated that there was not a serious possibility of persecution in Fujian Province for a Protestant Christian like the applicant, even if he were to attend a church that was not sanctioned by the state.

IV. STANDARD OF REVIEW

[17] It is well-established that the RAD's decision, including its credibility findings, is reviewed on a reasonableness standard (*Huruglica* at para 35; *Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819 at para 15; *Majoros v Canada (Citizenship and Immigration)*, 2017 FC 667 at para 24). This standard also applies to the RAD's assessment of the admissibility of new evidence (*Downer v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 45 at para 22; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*]).

[18] 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. ISSUES

[19] The applicant pursued three issues on this application:

- a) Did the RAD err in refusing to admit new evidence?
- b) Is the RAD's determination that the RPD did not err in drawing a negative credibility inference from the applicant's delay in making a claim for refugee protection reasonable?
- c) Is the RAD's determination that the RPD did not err in concluding that there was not a serious possibility that the applicant would be persecuted in China reasonable?

[20] In his Memorandum of Argument, the applicant also challenged the RAD's finding that he was not a genuine practicing Christian in Canada. Contrary to the applicant's written submissions, the RAD made no such finding. No doubt that is why this issue was not pursued in oral argument.

VI. ANALYSIS

A. *Did the RAD err in refusing to admit new evidence?*

[21] The admissibility of new evidence on an appeal to the RAD is governed by subsection 110(4) of the *IRPA*. This provision states:

110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available,

110(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas

<p>or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.</p>	<p>normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.</p>
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[22] The RAD must apply these criteria when determining whether or not to admit new evidence (*Singh* at para 63). The factors discussed in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13-14 (credibility, relevance, newness, and materiality) are also applicable, although they must be adapted to the context of a RAD appeal. For example, materiality must be understood in light of the mandate of the RAD to intervene to correct any error of fact, law, or mixed fact and law (*Singh* at paras 44-49). On judicial review, the Court's role is to determine whether the RAD's ruling on admissibility is reasonable, not whether the new evidence is admissible.

[23] As set out above, the new evidence in issue on the applicant's appeal to the RAD was the letter from Reverend Ko dated June 11, 2017. In my view, the RAD erred in rejecting the letter in its entirety on the basis that the information in the letter was not new. Although most of the letter simply repeated information already on the record (and was therefore reasonably found to be inadmissible), it did contain some genuinely new information – namely that, as of June 11, 2017, the applicant continued to be an active member of the Living Stone Assembly. This information was new because it related to events occurring after the May 2, 2017, refugee hearing. However, while the RAD thus erred in this respect, the error was immaterial because the information itself was immaterial to the issues before the RAD. As noted above, the RPD found that the applicant was a genuine practicing Christian in Canada and the RAD did not disturb this finding.

- B. *Is the RAD's determination that the RPD did not err in drawing a negative credibility inference from the applicant's delay in making a claim for refugee protection reasonable?*

[24] The governing principles concerning delay in seeking refugee protection can be summarized as follows:

- a) Delay in seeking refugee protection is not determinative of the claim; rather, it is a factor the decision-maker may take into account in assessing the claim's credibility (*Calderon Garcia v Canada (Citizenship and Immigration)*, 2012 FC 412 at paras 19-20).
- b) In particular, delay can indicate a lack of fear of persecution in the country of reference on the part of the claimant (*Huerta v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 271 (FCA), 157 NR 225). Put another way, delay can be probative of the credibility of the claimant's assertion that he or she fears persecution in the country of reference (*Kostrzewa v Canada (Citizenship and Immigration)*, 2012 FC 1449 at para 27).
- c) Whether there has been delay and, if so, its length must be determined with regard to the time of inception of the claimant's fear as determined from the claimant's personal narrative.
- d) The governing question is: Did the claimant act in a way that is consistent with the fear of persecution he or she claims to have?
- e) Delay in seeking protection can be inconsistent with subjective fear because generally one expects a genuinely fearful claimant to seek protection at the first opportunity (*Osorio Mejia v Canada (Citizenship and Immigration)*, 2011 FC 851 at paras 14-15).

- f) When a claimant has not sought protection at the first opportunity, the decision maker must consider why not when assessing the significance of this fact. A satisfactory alternative explanation for why the claimant waited to seek refugee protection can support the conclusion that the delay is not inconsistent with the fear of persecution alleged by the claimant. Absent a satisfactory alternative explanation, it may be open to a decision-maker to conclude that, despite what the claimant now says, he or she does not actually fear persecution and that this is why protection was not sought sooner (*Espinosa v Canada (Citizenship and Immigration)*, 2003 FC 1324 at para 17; *Dion John v Canada (Citizenship and Immigration)*, 2010 FC 1283 at para 23 [*Dion John*]; *Velez v Canada (Citizenship and Immigration)*, 2010 FC 923 at para 28).
- g) Whether an alternative explanation is satisfactory or not depends on the facts of the specific case, including the claimant's personal attributes and circumstances and his or her understanding of the immigration and refugee process (*Gurung v Canada (Citizenship and Immigration)*, 2010 FC 1097 at paras 21-23; *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at paras 57-60; *Dion John* at paras 21-29).

[25] As set out above, the RAD found that the RPD did not err in rejecting the applicant's explanation for why he waited two years before submitting his refugee claim and drawing a negative inference concerning the applicant's credibility from this delay. The RAD's conclusion rests on the following inference: given that the applicant was in Canada illegally and could have been arrested and deported to China at any time, and given that he believed Christians like himself were persecuted in China, it was unreasonable for him not to have sought out more information concerning refugee protection or visa requirements in Canada instead of simply

relying on the advice of friends and fellow churchgoers, who were not experts on the subject. As I will explain, this inference is problematic for several reasons.

[26] In considering whether a refugee claimant's actions stand up to scrutiny, it may be appropriate to consider how a reasonable person would have acted in the same circumstances. However, this carries risks. One risk is that culturally determined norms of "reasonable" behaviour are imposed on a claimant who may not share them. Another is that this question can deflect attention away from the real issue – namely, what did the claimant actually believe and do? This is what happened here. Rather than examine the applicant's beliefs and actions in light of one another, the RAD took the view that the applicant should have been more concerned about his precarious circumstances than he was and, having regard to how concerned he should have been, determined that he did not act consistently with this. But this answers the wrong question. What is in issue when assessing the significance of delay is what a claimant says he or she actually feared and whether he or she acted consistently with those fears. This is a subjective inquiry, not an objective one. In the present case, it is appropriate to ask whether the applicant acted consistently with any fears he claimed to have. It is of no assistance to ask whether he acted consistently with fears he never claimed to have but which, in the view of the RAD, he should have had.

[27] The fact that this was a *sur place* claim made it particularly important to be clear about what the applicant said he feared and the point of inception of those fears. The applicant did not arrive in Canada fleeing persecution. Rather, while in Canada, he came to fear persecution if he had to return to China because he had become a Christian. It is unclear on the record exactly

when the applicant learned that Christians were persecuted in China but it appears it was around the time he was introduced to the Living Stone Assembly. (Recall that he was introduced to the church in July 2015 by Mr. Li, who was a Christian who had fled persecution in China.) The critical point, however, is that the applicant's evidence was that until he was arrested, he was not concerned about any risk to himself. Until he was arrested, he was not facing removal from Canada and, in any event, he believed his fate was in God's hands. His fears only crystalized when he was arrested, which of course is when he made his refugee claim. While the applicant's attitude prior to his arrest may have turned out to have been unwise, it is not appropriate to consider it unreasonable. In any event, and most importantly, it is what the applicant claimed to have believed at the time. The RAD did not measure his actions against this. Instead, it measured them against what, in the RAD's view, he ought to have feared – namely, that he could be removed from Canada to China at any time. Having found that the applicant did not act consistently with this, the RAD concluded that the applicant therefore did not subjectively fear persecution in China. By approaching the issue in this way, the RAD did not conduct the necessary subjective inquiry, focusing instead on an irrelevant objective factor. As a result, its conclusion concerning the significance of the applicant's delay in seeking refugee protection lacks justification, intelligibility and transparency.

[28] For these reasons, I find that the RAD's analysis of the issue of delay is unreasonable. This, however, is not determinative of the application for judicial review. To succeed, the applicant must also establish that the RAD's determination that he failed to establish the objective component of his fear is unreasonable. I turn to this issue now.

C. *Is the RAD's determination that the RPD did not err in concluding that there was not a serious possibility that the applicant would be persecuted in China reasonable?*

[29] The applicant submits that the RAD relied on a selective reading of the country documentation and ignored or unreasonably diminished the value of evidence that ran contrary to its conclusion. I disagree. In my view, the RAD's conclusion that the applicant had failed to establish a serious possibility that he would be persecuted in China was reasonably open to it on the evidence.

[30] The RAD expressly found two items of evidence to be of little value. One was the statement by Reverend Ko in his letter of January 28, 2017, that "Christians are being persecuted in China and all of our real Christians cannot practice our religion freely and openly." The other was the evidence that the applicant's friend, Mr. Li, had been recognized as a refugee by Canada in 2008 on the basis of a fear of religious persecution in China. Assessing the value of such evidence falls squarely within the mandate of the RAD. There is no basis for interfering with its determinations here.

[31] As for the balance of the documentary evidence (found in the NDP along with sources tendered by applicant), the RAD reviewed this evidence thoroughly in its reasons. The record certainly included evidence that Christians are persecuted in China and that conditions for them may be worsening (for example, the 2016 Annual Report from the China Aid Association, detailing allegations of the persecution of Christians by the Chinese government during that year). The RAD did not ignore this evidence. Rather, the RAD found that while there had been a disturbing increase in anti-Christian sentiment and incidents, this was not widespread and was

not occurring on a national level. The RAD noted in particular that there was limited evidence of persecution of house church Christians in the applicant's home province of Fujian. There was a report that a church there had been demolished but details were scant and, without more information about how and why this had happened, the RAD reasonably found this report had little probative value. Apart from this one event (whose circumstances were unclear at best), the RAD found no reports of persecution of Christians in Fujian Province. The applicant has not pointed to any evidence in the record that is inconsistent with this conclusion.

[32] Considering the evidence as a whole, the RAD found that the applicant had failed to establish that, should he return to China and continuing practicing Christianity in the manner he wished, he faced a serious possibility of persecution or, on a balance of probabilities, that he would be personally subjected to a danger of torture or face a risk to his life or a risk of cruel and unusual treatment or punishment. While this was doubtless not the conclusion the applicant hoped the RAD would reach, and a different conclusion may well have been open to the RAD, it was reasonably supported by the evidence. There is no basis for interfering with it.

VII. CONCLUSION

[33] For these reasons, the application for judicial review is dismissed.

[34] The parties did not suggest any serious question of general importance for certification under subsection 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-904-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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