

Federal Court



Cour fédérale

Date: 20191031

Docket: IMM-4463-18

Citation: 2019 FC 1366

Ottawa, Ontario, October 31, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

YANXIA HUANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Yanxia Huang, a citizen of the People's Republic of China, has applied for judicial review of a decision made on August 15, 2018 (the Decision) by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. The RPD determined that Ms. Huang was not a Convention refugee and is not a person in need of protection. She says that the RPD committed several serious errors in the course of denying her claim and the Decision should be set aside.

[2] Ms. Huang claims to be in fear of persecution from the Public Security Bureau (PSB) because she is a Falun Gong practitioner, having begun to practice it in China in April 2010 for health reasons. She states that she has practiced Falun Gong for the past seven years in Canada.

[3] Ms. Huang submitted her refugee claim in October 2011 but, as one of a group of files known as “legacy claims”, it was held in abeyance until the RPD hearing on August 7, 2018.

[4] The RPD found that the determinative issues were Ms. Huang’s credibility and her identity as a Falun Gong practitioner. It found that her allegation of practising Falun Gong in China was not credible. The RPD also found that she did not provide sufficient credible evidence to prove the genuineness of her Falun Gong practice in Canada.

[5] Ms. Huang’s Personal Information Form (PIF) detailed the events which led her to leave China and the method by which she arrived in Canada with the help of a smuggler. She testified at the RPD with the assistance of an interpreter as to her Falun Gong practice and knowledge and was questioned by the panel about her travel documents as well as the PSB summons left with her parents.

[6] For the reasons that follow, this application is allowed.

II. **Standard of Review**

[7] The standard of review of the factual findings of the RPD, including any alleged errors in the RPD’s credibility analysis, is reasonableness: *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 22 [*Rahal*].

[8] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[9] If the reasons, when read as a whole, “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, the *Dunsmuir* criteria are met”: *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16 [*Nfld Nurses*].

[10] A tribunal is not required to consider and comment upon every issue raised by the parties. The issue for the reviewing court is whether the decision when viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65 at para 3.

III. Issue

[11] The issue to be determined is whether the Decision is reasonable.

[12] Ms. Huang submits that the RPD erred in assessing her evidence. She challenges the panel’s assessment of the PSB summons and the number of visits made by the PSB. She also challenges the panel’s treatment of her United States visa, saying that the reasons provided by the RPD were not transparent or intelligible.

[13] The primary issue raised by Ms. Huang is whether the RPD's analysis of her *sur place* claim was reasonable. She submits that the RPD unreasonably concluded that she had no such claim, relied on various unreasonable credibility findings, and engaged in speculative findings.

IV. Analysis

[14] The RPD is owed significant deference in matters of credibility because it had the advantage of hearing Ms. Huang testify and, because it has subject matter expertise that the Court lacks: *Rahal* at para 42.

[15] However, given the importance of the issues at stake in a refugee claim, where a matter turns on credibility, the RPD must provide reasons to support their assessment. A generalized, imprecise and vague credibility conclusion without particulars is subject to being set aside on review: *Rahal* at para 46.

[16] The importance of the RPD findings in this matter is underscored by the fact that this is a legacy case, so Ms. Huang had no right of appeal to the Refugee Appeal Division.

A. *US Visa*

[17] The first piece of evidence considered by the RPD was the US visa that Ms. Huang used to travel from the United States to Canada. When questioned at the hearing, Ms. Huang acknowledged that the visa was improperly obtained, as she applied for the visa with the intent of coming to Canada.

[18] The panel questioned Ms. Huang at some length about whether she knew the contents of the application form used to obtain the US visa. She indicated that she signed the form, which was completed with the help of the smuggler, but that she did not know what information was provided in it.

[19] The RPD extracted in the Decision the following excerpt from *Wang v Canada (Citizenship and Immigration)*, 2016 FC 972:

a refugee claimant may need to lie in order to obtain a visa to get to Canada and make a refugee claim, but when she does so, she ought to immediately correct the record and most certainly not later than when the refugee claim is made.

[20] The RPD then stated that Ms. Huang was “less than candid” in her evidence and concluded that this “cast aspersions” on the credibility of her allegations.

[21] The RPD specifically noted at the beginning of the hearing, when running through the list of exhibits it had, that there were no interview notes from the port of entry. There was therefore no evidence before the RPD that Ms. Huang had misled an official when she entered Canada.

[22] The RPD was aware that in her PIF, filed a few weeks after she arrived in Canada, Ms. Huang indicated that she had “improperly obtained” her Chinese passport and her US visa and that her US passport was “not genuine”. In fact, at the hearing, the panel had a brief discussion with counsel for Ms. Huang about those items.

[23] A review of the transcript indicates that Ms. Huang truthfully answered the questions posed by the RPD at the hearing by confirming when questioned that the visa was improperly

obtained and that the real purpose of her visit was to come to Canada. She admitted that the US passport was fraudulent, and said that she was not sure whether the Chinese passport was genuine – although her real name and information was used, she could not confirm whether the passport was real because the smuggler obtained it.

[24] Given the evidence before the RPD and considering *Wang* it is not possible to understand why the panel came to the conclusion that Ms. Huang was less than candid. The reasons are neither transparent nor intelligible with respect to the US visa and, as such, that aspect of the Decision is not reasonable.

[25] However, that finding, by itself, is not determinative of whether the Decision overall is reasonable.

B. *The PSB Pursuit*

[26] At the RPD hearing, Ms. Huang testified that the PSB visited her home three times before she left China. She also testified that following her departure from China, the PSB looked for her approximately three times a year. The RPD pointed out that the PIF did not state that the PSB went to her home three times before her departure and when questioned about that, Ms. Huang said she forgot to put it down.

[27] The RPD also pointed out that if the PSB had visited her home three times per year after her departure that would amount to approximately 20 additional visits.

[28] The RPD noted that no evidence had been adduced that Ms. Huang's family members encountered problems as a result of her not turning herself in to the authorities. On that basis, the RPD drew an adverse credibility finding against Ms. Huang given her evidence of the interest the PSB had shown in her. The RPD however failed to indicate the basis upon which it believed that Ms. Huang's family might encounter problems other than mentioning the thrice-yearly visits.

[29] The RPD referred to no evidence that the family members would encounter problems from the PSB. It appears to have speculated that because the PSB was interested in Ms. Huang, it would cause problems for her family. Such findings of implausibility are only to be made in the clearest of cases based on clear evidence, a clear rationalization process supporting the inference, and with reference to any relevant evidence which could potentially refute the conclusion: *Santos v Canada (Minister of Citizenship & Immigration)*, 2004 FC 937 at para 15.

[30] The RPD failed to justify the implausibility finding, making it unreasonable.

C. *PSB Summons*

[31] The RPD examined the summons that Ms. Huang said the PSB had left with her parents. The panel determined that it was a *Chuanpiao*, which it said is a non-coercive investigative summons.

[32] The RPD found that the objective evidence confirmed that a coercive summons can be issued in cases of non-compliance and it was reasonable to expect a coercive summons would have been issued in light of the vigorous efforts made by authorities to pursue members of

Falun Gong. The source cited by the RPD for that finding is the Response to Information Request CHN1044188.E (RIR) which is part of the National Documentation Package for China.

[33] The RPD erred in stating that a *Chuanpiao* is a non-coercive investigative summons. According to the RIR, “[s]ubpoenas (chuanpiao) are served by people’s courts to require all parties to criminal proceedings to appear in court”. Contrary to the RPD’s finding, a *chunpiao* is a coercive document. It requires a person to appear in court.

[34] It may be that the RPD’s confusion over whether the document was coercive or not came from the English translation of the *Chuanpiao* in the Certified Tribunal Record (CTR). It is headed “People’s Court of Baiyun District Guangzhou City”. The subheading is “Chuanpiao” and the translator has added “(it can be translated as a summons or subpoena)”.

[35] In terms of the compulsory or coercive nature of the document, the body of the document indicates that:

1. the person summonsed must arrive at the said address on time;
2. The person summonsed must bring this summons as an entry certificate.

[36] The RIR statement that a *Chuanpiao* is a subpoena is to be preferred to a translator’s assessment of the nature of the document. Even if the document could be either a summons or a subpoena, the translation is clear that it is a coercive document; the person receiving it “must” do certain things.

[37] The importance of this error by the RPD is significant.

[38] The RPD discussed that public security summonses cannot last more than twelve hours, or twenty-four hours if the person is suspected of administrative violations punishable by detention. It noted the PSB were alleged to have attended at her house to arrest her and that two of her co-practitioners were arrested by the PSB. The RPD then found it “reasonable to believe” that the PSB would use a coercive instrument to carry out their intention to arrest Ms. Huang.

[39] The RPD concluded the analysis of the summons by finding that Ms. Huang’s allegations and testimony were inconsistent with the objective evidence in the record. It concluded that little weight could be given to the summons in establishing that she was being pursued by the PSB.

[40] These conclusions by the RPD were entirely based on the panel’s mistaken belief that there was no compulsory summons. That belief was then used to undermine the genuineness of the summons. As that conclusion was drawn based on erroneous findings of fact, without regard for the material in the record, the conclusion is unreasonable.

[41] The RPD concluded that section of the Decision by saying that in the absence of credible evidence, Ms. Huang was not wanted by the PSB for any reason, including her alleged practice of Falun Gong.

D. *Sur Place Claim*

[42] Ms. Huang submitted to the RPD that as she had been practising Falun Gong in China for only 17 months but had practised it for approximately 84 months in Canada, the relevant evidence of her identity as a Falun Gong practitioner was her time in Canada. The RPD acknowledged that submission but declined to adopt the submission. The RPD found that it had

to consider Ms. Huang's practice in China because it went to her credibility and provided the impetus for her to practice Falun Gong in Canada.

[43] In her oral submissions to the RPD, Ms. Huang argued that because hers was a legacy claim, the usual situation of more practice in China and less in Canada was turned upside down. She added that "the case law is quite clear and indicates that a *sur place* claim in Canada can be based upon Canadian experience and do not require that the events in China have impacted or created the *sur place* claim." She added that her Canadian Falun Gong activities did not need to be known in China. It was sufficient that she show that if she returned to China and attempt to practice Falun Gong, she would more than likely be arrested because it is prohibited.

[44] The RPD did not address those arguments. It acknowledged and dismissed four letters of support from fellow practitioners in Canada and a number of photos that it said were barely recognizable. The RPD said that neither the letters nor the photos showed that Ms. Huang was a genuine practitioner of Falun Gong. It did not address the submission whether Ms. Huang would be perceived in China as a Falun Gong practitioner.

[45] The RPD did not discuss or comment upon the extensive testimony by Ms. Huang in which she answered a wide variety of questions about her knowledge of Falun Gong.

[46] The RPD cited a passage from *Su v Canada (Citizenship and Immigration)*, 2013 FC 518 in which Justice Mary Gleason, as she then was, explained that it is not unreasonable to find that evidence was insufficient to support a *sur place* claim when it is viewed in light of a finding that what happened in China had been fabricated.

[47] In the conclusion, the RPD specifically mentioned again that Ms. Huang was not wanted by the PSB for any reason, including the practice of Falun Gong. It imported its unreasonable credibility finding and concluded that Ms. Huang had not provided sufficient credible evidence to support her claim and that she had engaged in Falun Gong activities only for the purpose of bolstering a fraudulent refugee claim.

[48] As I have found that the RPD erred and unreasonably arrived at the negative credibility finding regarding the PSB and Falun Gong, it follows that the *sur place* analysis by the RPD is equally tainted and unreasonable.

V. **Conclusion**

[49] As discussed above, the RPD made a series of findings that were made on either misconstrued evidence or without regard to other evidence in the record.

[50] The RPD rendered unintelligible reasons for finding Ms. Huang was less than candid about her US visa even though she had disclosed in her PIF that it was improperly obtained.

[51] The RPD engaged in unsubstantiated speculation as to what the PSB would do with respect to Ms. Huang's family.

[52] The RPD made a fundamental error with respect to the PSB summons, which was actually a subpoena. That error was then leveraged to arrive erroneously at the finding that Ms. Huang was not a Convention refugee nor a person in need of protection.

[53] As a result of the various errors and lack of transparency in the reasons for the Decision, it must be set aside and returned for redetermination by a different panel.

[54] There is no serious question of general importance arising on these facts.

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THIS COURT'S JUDGMENT is that:

1. The application is allowed and the Decision is set aside.
2. This matter is returned for reconsideration by a different panel.
3. No serious question of general importance arises.
4. No costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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