Federal Court  Cour fédérale

Date: 20130822

Docket: IMM-6239-12

Citation: 2013 FC 896

Ottawa, Ontario, August 22, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

PENG FEI LIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board, dated 18 June 2012 [Decision], which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 26-year-old citizen of China. He seeks protection in Canada from the Chinese Public Security Bureau [PSB]. The following narrative was laid out in the Applicant's Personal Information Form [PIF] submitted with his refugee claim.

PIF Narrative

[3] The Applicant was born and raised in Gaocheng City, Hebei Province, China. The Applicant's mother began practising Falun Gong in 2006, and attended weekly meetings in private homes. The Applicant and his father did not practise Falun Gong.

[4] On 19 February 2009, the Applicant came to Canada on a student visa. The Applicant learned more about the practise of Falun Gong while in Canada, and how Falun Gong practitioners were persecuted in China. His mother requested the Applicant send her some materials, and between May, 2009 and November, 2009 the Applicant mailed Falun Gong brochures and leaflets to his mother in China three times.

[5] On 17 January 2010, the Applicant received a phone call from his father. His father said that his mother's Falun Gong group had been raided on 16 January 2010, and PSB officials had found the materials the Applicant had sent from Canada. PSB officials had detained the Applicant's mother, who remains in custody. The PSB had also detained the Applicant's father overnight for questioning, and he had to report to officials on a monthly basis from then on. The PSB also left a summons with the father requiring the Applicant to return to China immediately for questioning. The father told the Applicant not to return to China, as he would surely be put into jail.

[6] In late January 2010, the father was dismissed from his work due to the mother's Falun Gong activities, and the Applicant's brother was dismissed from his school for the same reason. PSB officials have continued to attend at the family's home looking for the Applicant. The Applicant filed for refugee protection on 7 May 2010.

DECISION UNDER REVIEW

[7] The RPD's primary concern with the Applicant's claim was credibility. The Applicant presented a summons of the "Zhuan Huan" type, which is used when cooperation is expected or flight is not likely. It was not the coercive type of summons. Along with the summons, the Applicant presented documentary evidence on the role of appellate courts in China, which did not correspond to the documentary evidence that was before the RPD. The RPD preferred its own documentary evidence on the different types of summons because it came from multiple sources and corresponded to the actual evidence in front of it. The RPD noted that its documentary evidence was dated 1 June 2004, but there was no indication that the information it contained was no longer valid. The RPD also noted that the summons did not reference Article 92 of the *People's Republic of China Criminal Procedure Law*, as the documentary evidence said it likely would. Based on this, the RPD determined the summons was not genuine.

[8] The RPD was also not persuaded that Chinese authorities, knowing the Applicant was in Canada, would continue looking for him and found, on a balance of probabilities, that this was not happening. The Applicant also testified that PSB authorities questioned his brother, but omitted this information from his PIF. The RPD considered this a significant omission because it was relevant to the extent to which PSB authorities were still interested in the Applicant. The Applicant's explanation for the omission of this evidence from his PIF was that if his brother was dismissed

from university, it necessarily meant he was questioned by the PSB, but the RPD did not find this explanation satisfactory. The RPD concluded that the brother was not questioned by the PSB and was not dismissed by his university.

[9] With respect to documentation submitted by the Applicant in support of his mother's detention and his father's dismissal from his employment, the RPD made reference to the documentary evidence which highlighted the availability of fraudulent documentation in China. As the RPD had already determined the summons was not genuine, it gave no weight to the documents indicating detention and dismissal.

[10] The Applicant alleged that he took special precautions when mailing Falun Gong materials to his mother. In particular, he changed the name of the recipient to someone not in his household. The RPD did not see this as meaningful, as the Chinese authorities were aware that the Applicant was in Canada and the documentation indicated that proof is not necessarily required by the Chinese police system. The fact that the Applicant sent the materials by courier might have actually increased scrutiny, and placed his mother more at risk.

[11] Based on the above noted credibility concerns, the RPD determined there was no credible evidence on which to find that the Applicant was a Convention refugee or person in need of protection under sections 96 or 97 of the Act. Thus, his claim was rejected.

ISSUES

[12] The Applicant raises the following issue in this application:

a. Whether the RPD made unreasonable credibility findings by: (i) improperly assessing the Applicant's summons and misconstruing evidence about the issuances of summonses in China; (ii) making speculative findings about the actions of the PSB; (iii) rejecting credible documentary evidence; and (iv) making adverse plausibility findings in circumstances where the facts presented were not outside the realm of reasonable expectations.

STANDARD OF REVIEW

[13] The Supreme Court of Canada, in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[14] In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) the Federal Court of Appeal held that the standard of review on a credibility finding is reasonableness. Further, in *Elmi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155, Justice Mary Gleason held at paragraph 9 that the standard of review on a credibility determination is reasonableness. The standard of review on the first issue is reasonableness.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in this proceeding

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries;	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
[…]	[…]
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son

nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards,	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
[…]	[…]

ARGUMENTS

The Applicant

[17] The Applicant points out that there is a presumption of truthfulness with regards to an applicant's testimony, and that periphery findings of inconsistency should not detract from the core elements of a refugee claim. As the Court said at paragraph 20 in *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429:

> Third, not every kind of inconsistency or implausibility in a claimant's evidence will reasonably support the Board's negative findings on overall credibility. It would not be proper for the Board to base its findings on an extensive "microscopic" examination of issues irrelevant or peripheral to the claim. Furthermore, the claimant's credibility and the plausibility of her or his testimony should also be assessed in the context of her or his country's conditions and other documentary evidence available to the Board. Minor or peripheral inconsistencies in the claimant's evidence should not lead to a finding of general lack of credibility where documentary evidence supports the plausibility of the claimant's story.

[18] The RPD's rationale for finding the summons not to be genuine was that it did not reference Article 92 of the *People's Republic of China Criminal Procedure Law*; the Applicant's summons made reference to Articles 300 and 189 of the *Criminal Procedure Law*.

[19] Firstly, the Applicant submits that this finding was unreasonable because there was no evidence that the sample summons in the documentary evidence was even the same type of summons as the Applicant's. Secondly, the only document relied on by the RPD was an outdated Response to Information Request from 1 June 2004. The Applicant submits this is not a reliable authority as to what a summons issued in 2010 would look like. This was affirmed in *Lin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 288.

[20] Even if this documentary evidence is accepted, the Applicant submits that it was misconstrued by the RPD. The document specifies that the summonses are "samples," and not that they are the only type of summons in China. Nor does it say that the style and form of summons is uniform across the country. A more recent Response to Information Request dated 6 July 2010, which was not considered by the RPD, states that there are wide discrepancies in the form of summonses throughout the country. The fact that the Applicant's summons was different in certain respects from the 2004 example is neither surprising nor suspicious. As the Court said in *Lin*, above, at paragraphs 51-53:

> As the Applicant points out, the RPD then went on to reject nearly all of the other documents he submitted to support his claim. The RPD began by finding that the Notice is fraudulent. The Applicant submitted the Notice along with its English translation. At the hearing, it was determined, through consultation with the assigned RPD-certified interpreter, that the English translation of the Notice the Applicant supplied contains an error. The English translation refers to Article 92(1) of the Criminal Law of the PRC, which is not the statute actually referenced in the Applicant's original Notice. The RPD accepted that the Notice actually refers to the Criminal Procedure Law and that the English translation contains an error. However, the RPD nevertheless impugned the authenticity of the document. In this regard, the RPD referred to documentation from its own National Documentation Package which provides examples of Chinese Notices of Summons. The RPD compared the Notice to these examples and determined that it was significantly different in appearance.
>
> I accept the Applicant's argument that this finding was entirely unreasonable. RIR CHN42444.E, which the RPD relied upon, dated from June 2004. It is highly unlikely that this document could be a reliable authority as to what a Notice issued in 2009 would look like. In any event, RIR CHN42444.E specifies that the example summonses are "samples." The document does not say that these are the only forms of summonses issued by Chinese authorities; nor does it say that the style and content of summonses is uniform throughout China. On the contrary, as the Applicant points out, the document shows that procedural laws are not uniformly implemented in the PRC. In particular,

> [...] while procedural laws in China are expected to be uniformly implemented and concerted efforts have been made by the Minister of Public Security to improve policing standards, in practice, the "PSP [Public Security Bureau] has yet to arrive as a rule of law institution." According to the associate professor, there can be substantial regional variances in law enforcement, in which some differences are written into policies, but "in most instances rule of the book gives way to norms in the street."

> Accordingly, based on the information in the RIR, the fact that the Notice is different in certain aspects from the samples attached to the RIR is neither surprising nor suspicious. I agree with the Applicant that the RPD erred by rejecting his Notice on the basis of an overly strict and ultimately misguided interpretation of an outdated document.

[21] Further, there is no indication when or where the sample discussed by the RPD was issued. Not only that, it is not proper procedure in China for PSB officials to leave a summons with family members, yet it often happens. The fact that PSB officials left the summons with the Applicant's father indicates that the PSB officials handling his case were not aware of proper policy and were not acting in accordance with the law, and it was therefore unreasonable for the RPD to expect that a summons would have been issued properly.

[22] The Applicant also submits that the one piece of documentary evidence cited by the RPD does not support the proposition that fraudulent summons are easily available in China. The document relied upon in this case pertains to Guangdong and Fujian provinces, but the Applicant is from Hebei province. Furthermore, the document says that specific information on fraudulent summonses could not be found. Therefore, it was unreasonable for the RPD to rely on this documentary evidence.

[23] The Applicant submits that the RPD's erroneous findings with regards to the summons tainted the entire Decision, rendering it unreasonable.

[24] The Applicant further submits that the RPD made unreasonable assumptions about the actions of the PSB. There was no objective basis for the RPD's finding that the PSB would not continue visiting the Applicant's home in China when they knew that he was in Canada. The RPD should not speculate on the mental processes and efficiency of the Chinese authorities.

[25] Furthermore, the documentary evidence cited by the RPD states that family members of Falun Gong practitioners often face repercussions, such as random police visits to their homes. In light of this, the Applicant submits that it is not implausible that PSB officials would have returned repeatedly to his parents' home looking for him.

[26] The RPD also rejected the Applicant's evidence that confirmed that his mother was detained and his father had lost his job because it has previously determined that the summons was fraudulent and fraudulent documentation is available in China. A finding that one document is fraudulent is insufficient grounds to base a finding that every other document is also fraudulent; there must be actual evidence that the document is fake (*Zheng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 877 [*Zheng*]).

[27] The RPD also did not believe the Applicant's testimony that he changed the recipient's name and couriered Falun Gong materials to his mother in China. The RPD failed to presume that his testimony was true when there was no reason to doubt its truthfulness (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776). At the time when the Applicant sent the

materials his mother was not known to be a Falun Gong practitioner, and the Applicant submits that his actions were not outside the realm of reasonable expectations.

The Respondent

[28] The Respondent submits that the RPD is entitled to rely on the documentary evidence contained in the Response to Information Requests and to prefer that information to the explanation for the discrepancies in the summons offered by the Applicant. The RPD acknowledged that the information was dated, but found that it was still relevant and probative.

[29] In a similar case, *Chen v Canada (Minister of Citizenship and Immigration)*, 2011 FC 187 [*Chen*], the RPD concluded that a summons was not genuine because it lacked the relevant Criminal Procedure Law number:

> 10. Essentially, the applicant's complaint is with respect to the Board's assessment of the evidence. While it may be possible that a genuine Chinese summons may not contain the signature of the recipient or may lack a Criminal Procedure Law number, the evidence before the Board was that these two details are to be expected to be present on a genuine summons. The absence of these items and the availability of fraudulent documents in China led the Board to conclude that the summons was not genuine. That decision cannot be said to be unreasonable. It was based on the evidence before the Board.

[30] A sample summons can provide a proper evidentiary basis to question the authenticity of the summons presented (*Liu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 262). Furthermore, in *Zhou v Canada (Minister of Citizenship and Immigration)*, 2012 FC 790, Justice Anne Mactavish stated that even if the Court accepted arguments about the datedness of the 2004 RIR and regional variances in PSB procedures, the RPD was still entitled to make a negative

finding given discrepancies around the summons referencing the wrong law or article and a lack of signature on the document.

[31] One of the reasons the RPD found the summons in this case not to be genuine was that it cited the wrong Article of the Criminal Procedure Law – Article 189, which had to do with levels of courts. The RPD asked the Applicant about the discrepancy, but he could not explain it, and counsel made submissions that it was likely an error. The Respondent submits that it was reasonable for the RPD to prefer the documentary evidence.

[32] The Applicant points to the decision in *Lin*, above, for the proposition that it was unreasonable for the RPD to rely on the RIR from 2004. However, in *Lin*, the RPD was found to have erred for many reasons, and not solely due to its reliance on the 2004 RIR. There were many other important errors involved:

> 54. The RPD also found that the Notice was not genuine because the article from China's *Criminal Procedure Law* referenced in it is different from the one referenced in the sample Notice of Summons in the RIR CHN42444.E. However, both the Applicant's Notice and the sample Notice of Summons referenced the same article. As the RPD stated, the sample Notice of Summons refers to "Article 92." The Applicant's Notice also refers to Article 92. Accordingly, in my view, the RPD's finding here is clearly erroneous.

[33] The Applicant also says that the RPD did not consider the RIR dated 6 July 2010. It is presumed, however, that the RPD considered all the evidence, and there is no obligation for it to be specifically mentioned in the Decision (*Guzman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 490 at paragraphs 13-14). More importantly, this RIR does not address why the Applicant's summons varied in the way the RPD identified. The only evidence in this RIR about summonses is a comment that a red seal is expected. The presence or lack thereof was not a ground

for the RPD's finding that the summons was not genuine, and therefore it was reasonable for the RPD not to have specifically mentioned it.

[34] The Respondent also points out that the RPD specifically asked the Applicant why the PSB would be interested in him given that they knew he was in Canada, to which the Applicant speculated that they may still be interested in him, but he was not sure. The Applicant also admitted that he was not aware that Chinese authorities could track when citizens entered or left China.

[35] The Applicant also claims that the RPD ignored evidence that family members of Falun Gong practitioners are persecuted but, as discussed above, the RPD is presumed to have considered all the evidence. It was open to the RPD not to find it plausible that the PSB was inquiring about the Applicant when they knew he was in Canada and had the means to confirm his return.

[36] Moreover, the RPD found that the Applicant had made a material omission in his PIF in that he failed to mention that his younger brother was questioned by the PSB. The RPD did not accept the Applicant's explanation that he did not say anything about this because it was self-evident that the PSB would have questioned the brother, and reasonably concluded that the brother was not removed from school and was not questioned by the PSB.

[37] It was also open to the RPD to reject other evidence because the Applicant had already shown he was willing to present fraudulent documentation and because fraudulent documentation is widely available in China. Further, this evidence did not demonstrate that the Applicant was at risk for his mother's participation in Falun Gong. Thus, even if the RPD made an error in its treatment of this evidence, it had no impact on the overall result.

[38] It was also open to the RPD to find that it was implausible that the Applicant sent Falun Gong materials to his mother. The Applicant was aware that participating in Falun Gong activities is prohibited in China, yet allegedly took the risk of sending materials to his mother. It was reasonable for the RPD to find that his "precautions" were not meaningful, and in light of this it was open to the RPD to find that the Applicant did not in fact send the materials. This was a plausibility finding within the RPD's purview (*Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114 (FCA)).

ANALYSIS

[39] I agree with the Applicant that the RPD's findings with regards to the summons heavily impacted the rest of the Decision.

[40] In assessing the genuineness of the summons the RPD relied upon the 1 June 2004 documentary package that has come before the Court in several decisions. For example, Justice Donald Rennie recently examined it in *Lin*, above, and warned against overly strict and ultimately misguided interpretations of an outdated document.

[41] As the Applicant points out, the sample summonses cited by the RPD in this case made no reference to where and when they were issued so that it is not possible to know whether they were used in the same timeframe or in the same region of China as the Applicant's summons. In my view, then, even if it was not unreasonable for the RPD to find the Applicant's summons to be fraudulent based upon a comparison with the samples in the documentation package, this cannot be considered a clear indication that the Applicant was misleading the RPD. All of the other available evidence had to be assessed on its merits and carefully weighed.

[42] The RPD, however, uses its findings regarding the summons to discount other documentation without any independent assessment of its authenticity:

> With respect to documentation provided in support of the claimant's mother's detention and his father's dismissal from employment, the panel again makes reference to previously identified documentation, which highlights the availability of fraudulent documentation in China. Given that the panel has already determined that the summons is not genuine, it gives no weight to those documents indicating detention and indicating dismissal.

[43] Even if the RPD's finding about the summons can be considered reasonable, this is faulty logic. The RPD does not know that the summons is fraudulent; it simply finds it to be so on a balance of probabilities, and it knows of the wide variations regarding summonses that exist across China. If the RPD had independently examined the other documentation, and found it authentic, then this could well have supported the genuineness of the summons. In the circumstances, it was unreasonable for the RPD to reject other supporting documentation outright because it had found the summons not be genuine. The RPD had an obligation to assess the other documentation independently. See *Zheng*, above**.** Both documents - and particularly the one dealing with the mother's detention - were material to the Applicant's credibility.

[44] The RPD makes other findings that are not related to documentation, but these findings are not in themselves sufficient to support the reasonableness of the Decision as a whole. The findings on the documentation were crucial. Had the RPD assessed all of the documentation in a reasonable way, it may well have viewed the Applicant's other testimony in a different light. Hence, there is no point in assessing the points raised by the Applicant on these other findings. The Decision is unsafe and unreasonable and must be returned for reconsideration.

[45] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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