Federal Court  Cour fédérale

Date: 20141112

Docket: IMM-2337-13

Citation: 2014 FC 1060

Ottawa, Ontario, November 12, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

WEILI ZENG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant was refused Canada's protection by the Refugee Protection Division of the Immigration and Refugee Board (the Board). He now seeks judicial review from this Court pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant asks for an order setting aside the Board's decision and returning the matter to another panel of the Board.

I. Background

[3] Weili Zeng (the applicant) is a Chinese citizen. He arrived in Canada on February 27, 2012 and asked for refugee protection within a month. He claims that he fears persecution for practicing Falun Gong ever since his practice group was raided by the Public Security Bureau (PSB).

II. Decision Under Review

[4] The Board refused the application on February 20, 2013.

[5] Essentially, the Board decided that the applicant lied about the events leading to his departure from China. It gave thirteen reasons for doubting the applicant's story:

i. The applicant said in his personal information form (PIF) that he was introduced to Falun Gong by his friend, Tang, in August 2010 and began practicing immediately. He later testified that he was introduced to it in June 2010, but only started practicing in August.

ii. Despite being asked for them, the applicant did not submit any transcripts to prove that practicing Falun Gong improved his grades.

iii. The applicant said that the group practices always happened between 8:00 p.m. and 9:30 p.m. Yet, the applicant testified that the lookout would be outside

sewing. When the member observed that it would be too dark during the winter, the applicant said she would sit near convenience stores. The Board was suspicious that the applicant did not mention the convenience stores at first. As well, the Board thought a lookout would not linger for so long for fear of drawing suspicion.

iv. After the alleged raid, the applicant said he lived with his 18 year old friend for three months to hide from the PSB. He testified that his friend's parents lived two to three hours away, but never once came home to check on their son or their property. The Board considered this implausible.

v. In his PIF, the applicant mentioned that his instructor and some other members of his group were arrested. However, he only mentioned that his friend Tang was among them at the hearing. The Board figured that the applicant would have mentioned Tang by name in his PIF because of his role in introducing the applicant to Falun Gong.

vi. Despite being asked for them, the applicant did not produce jail visiting cards that he could have obtained from Tang's mother.

vii. The applicant testified that his parents kept his copy of Zhuan Falun for him, but the Board considered it more likely that they would destroy it.

viii. The applicant said the PSB never left a summons with his family on any of the seven occasions they visited his house. Although that is technically proper procedure, the Board found that it happens all the time that the police leave a summons with a family member and inferred from its absence that the PSB had no interest in the applicant.

ix. The applicant received a passport one month before the alleged raid, which the Board thought was too coincidental.

x. The applicant left China with that genuine passport. The Board found that this could not have happened since these documents would have needed to be shown when travelling through Hong Kong. Further, if the smuggler had bribed anyone, he would have told the applicant.

xi. The applicant could not have left on a genuine passport if he was wanted by the PSB because China has a national computer network that would have flagged him.

xii. The applicant was in the United States for nine days but did not claim asylum.

xiii. The applicant did not prove that his family was punished, even though the families of Falun Gong practitioners often are.

[6] The Board accepted that the applicant did practice Falun Gong in Canada and so answered most basic questions about it correctly. However, because the Board did not believe that the applicant practiced Falun Gong in China, it concluded that the applicant only started doing it here to bolster a fraudulent refugee claim.

[7] Consequently, the Board decided that the applicant was neither a Convention refugee under section 96 of the Act nor a person in need of protection under section 97.

III. Issues

[8] This application raises two issues:

1. What is the standard of review?

2. Did the Board err in assessing the applicant's credibility?

A. *Applicant's Written Submissions*

[9] The applicant accuses the Board of conducting a microscopic assessment of the claim. Specifically, he criticizes the Board for seizing on two minor details to make negative credibility findings which were: (1) the minor discrepancy in the month he started practicing Falun Gong; and (2) the omission of Tang's arrest from the PIF.

[10] Further, he points out that plausibility findings should be made only when it is clear that the events could not have happened as described (see *Xu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 274 at paragraph 17, [2007] FCJ No 397 [*Xu*]). In his view, at least three of the events he described were not inherently improbable: (1) his friend's parents did not come home for three months; (2) his parents did not destroy his copy of Zhuan Falun; and (3) he obtained a passport one month before the raid.

[11] Similarly, the applicant says that he was able to leave with his own passport because he hired a smuggler. There is nothing implausible about that.

[12] As for the summonses, the documentary evidence clearly said that "there can be substantial regional variances in law enforcement". It may be common that summonses are left with families, but that is not the way it always happens. The applicant says the Board relied on

this evidence rather selectively and that the Federal Court has often found similar findings unreasonable.

[13] Finally, the applicant admits that the documentary evidence said that family members could be punished in a variety of ways, including "harassment by the police (random visit by police to the home), arbitrary interrogation, losing [a] job, losing [the] chance of promotion, losing [a] pension/state housing, etc." However, it did not say that all of those events necessarily happen to every family. Here, he testified that his family had been visited seven times and so has been harassed and arbitrarily interrogated.

IV. Respondent's Written Submissions

[14] The respondent recites the Board's credibility findings and says that it was not conducted microscopically. Rather, the Board reasonably weighed the evidence and drew reasonable inferences that it was entitled to make based on implausibilities and common sense.

[15] Further, the respondent says that the Federal Court has confirmed that a Board can reasonably consider the absence of a summons document when an applicant alleges that his or her family has been visited by the PSB (see *Cao v Canada (Minister of Citizenship of Immigration)*, 2012 FC 1398 at paragraph 35, 422 FTR 108 [*Cao*]). Given the credibility concerns, it was reasonable to require corroborating evidence.

[16] Finally, the respondent admits that the applicant had testified that his family was harassed. However, that was but one credibility finding of many and it should not disturb the general finding that he was lying.

V. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[17] The Board's credibility findings should be reviewed on the reasonableness standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) at paragraph 4, 160 NR 315 [*Aguebor*]). The Board's decision should not be disturbed so long as it is justifiable, transparent, intelligible and its outcome is defensible in respect of the facts and law (*Dunsmuir* at paragraph 47). Put another way, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708).

[18] As the Board itself observed, the starting point for assessing credibility is that the applicant is presumed to tell the truth (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, 31 NR 34 (CA)). At the same time, "credibility is the heartland of the Board's jurisdiction" (see *Mohacsi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 429 at paragraph 18, [2003] 4 FC 771 [*Mohacsi*]).

B. *Issue 2 - Did the Board err in assessing the applicant's credibility?*

[19] Although some elements of the Board's decision were problematic, I ultimately agree with the respondent that the decision was reasonable.

[20] With respect to plausibility findings, it is true that they should only endanger a claimant's credibility when it is clear that the events could not have happened as the claimant described (*Xu* at paragraph 17). However, it must be recalled that the Board is still better placed than this Court to make them. As the Court of Appeal said in *Aguebor* at paragraph 4:

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.
>
> [Emphasis added]

[21] Given that, I must disagree with the applicant that most of the Board's findings warrant this Court's intervention. With respect to the absence of his friend's parents, the Board explained that they were only two to three hours away by car. It found it implausible that they would not once check on their son or their property in a three month period. It also considered it strange that the applicant would never ask his friend whether they might come home. That seems to me a reasonable inference.

[22] However, some of the applicant's other arguments do reveal some problems.

[23] First, the Board found that it was implausible that his parents would merely hide the applicant's copy of Zhuan Falun instead of destroying it. Although I agree with the Board that it

seems unlikely, all the applicant said was that he asked his parents to hide it. He did not say that they actually did. Even if the parents destroyed it, it is plausible that they could have done so without telling the applicant.

[24] With respect to the summonses, the applicant points out that the documentary evidence is conflicting. Although one source said that "a summons would almost always be issued to the individual", another said that police authorities leave summonses with family members "all the time, especially in cases when the person on the summons is not easily locatable" (see Research Directorate of the Immigration and Refugee Board of Canada, RIR CHN42444.E, *China: Circumstances and authorities responsible for issuing summonses/subpoenas* (1 June 2004) at 3). This is partly because "there can be substantial regional variances in law enforcement".

[25] Nevertheless, the Board found it implausible that the PSB would visit the applicant's family seven times and never leave a summons.

[26] There appears to be conflicting jurisprudence from this Court as to whether this is reasonable. In *Cao* at paragraph 35, Mr. Justice David Near observed that "[w]hile the documentary evidence suggested that the PSB's practice with respect to leaving a summons is not uniform, it does not directly contradict the Board's finding." As such, the applicant had only shown that a different finding could have been made, not that the finding that was made was unreasonable.

[27] However, other decisions of the Court have held that similar inferences were unreasonable. In *Weng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 422, [2011] FCJ No 532, a claimant had said that the PSB had visited him ten times and never left a summons. The Board found that this was implausible. However, Mr. Justice Donald Rennie held that was an error, saying at paragraph 17 that "the applicant's testimony was clearly within the realm of possibility and was reconcilable with the country condition evidence before it regarding uneven practices on the part of the PSB." Similar findings were made by Mr. Justice James O'Reilly in *Liu v Canada (Minister of Citizenship and Immigration)*, 2010 FC 135 at paragraph 10, [2010] FCJ No 162 and by Mr. Justice Michel Shore in *Liang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 65 at paragraph 14 [2011] FCJ No 74 [*Liang*].

[28] With respect, I believe the latter view better accords with this Court's jurisprudence on plausibility findings. As Justice Shore explained in *Liang* at paragraph 14, "if the norm in the Applicant's region is for the PSB not to leave a summons/warrant for anyone other than the person who is named, then presumably that norm is followed regardless of how many times the PSB visits …". Therefore, if this were the only basis for the Board's decision, it would have been unreasonable for the Board to have rejected the applicant's credibility for having the misfortune to live in a region where he was persecuted by the correct procedure.

[29] As well, the respondent rightly concedes that the Board's finding regarding the punishment of family members was problematic. The documentary evidence upon which the Board relied does not say that every bad thing there listed happened to every single family of a

Falun Gong practitioner. Further, the applicant testified that his family was, in fact, being harassed. An implausibility finding on that subject was unreasonable.

[30] Despite those errors, however, the Board's other observations withstand scrutiny and justify the negative credibility findings.

[31] For one thing, the applicant does not challenge many of the Board's credibility inferences, including those regarding the missing transcripts and jail visiting cards, as well as those regarding the lookout.

[32] For another, the Board never ignored that the applicant said he was assisted by a smuggler. It simply found that it was unlikely that he could have left China on his own passport even with that assistance. Its explanation for this was reasonable.

[33] The applicant also claims that the Board's findings with respect to the applicant's friend, Tang, were microscopic (see *Attakora v Canada (Minister of Employment and Immigration)*, 1989 CarswellNat 736 (WL Can) at paragraph 9, 99 NR 168 (FC(AD))). However, pointing out inconsistencies on minor details is not in itself problematic. Rather, as Madam Justice Judith Snider explained in *Konya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 975 at paragraph 22, 63 Admin LR (5th) 27, "a microscopic analysis is one in which the Board examines a fact which has no material relevance to any issue; is outweighed by other evidence; and, is not central to the issues in the case, but is used to dispose of the case."

[34] In this case, the two statements about which the applicant complains were not used to dispose of the case. Rather, they were simply two elements used to corroborate a general finding that the applicant lacks credibility. In such a context, there is nothing unreasonable about observing that the applicant's PIF omitted or misrepresented details of his story.

[35] Further, neither of the Board's observations were themselves unreasonable. In his PIF, the applicant had said that his friend, Tang, told him about Falun Gong "[o]ne day in August, 2010" (emphasis added) and that he agreed to try it immediately. By the time the hearing came around, he said that Tang told him about Falun Gong two months before he tried it. While it is not a particularly important detail, the Board cannot be faulted for observing that it is an inconsistency.

[36] Similarly, it is strange that the applicant would not mention that Tang was among those arrested when filling out his PIF, considering the close relationship he allegedly had with him. The Board did not act unreasonably by pointing that out.

[37] The Board also found that it was "too co-incidental" that the applicant applied for a passport just one month before the alleged raid. Although I agree with the applicant that that is not implausible, it is suspicious. In light of all the other evidence that the applicant had fabricated his story, it was no error to point out that this too corroborates that finding.

[38] Therefore, although I agree that some of the Board's rationales were problematic, most of its findings remain unscathed. Given that, I still understand why the Board found that the

applicant lacks credibility. The decision that he did not genuinely practice Falun Gong was therefore reasonable.

[39] I would therefore dismiss the application for judicial review.

[40] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
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; or	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;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle

have a country of nationality, their country of former habitual residence, would subject them personally

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, and

(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,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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