

CANADA / JUDGMENT

TB9-15837

COURT

Refugee Appeal Division

DECIDED

28 July 2020

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RAD File / Dossier de la SAR : TB9-15837 TB9-15838 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXXXXXXXX XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à Date of decision July 28, 2020 Date de la décision Panel Kimberley Foreman Tribunal Counsel for the persons who are the subject of the appeal Nkunda I Kabateraine Conseil des personnes en cause Designated representative N/A Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION

INTRODUCTION

- [1] XXXX XXXX (the Principal Appellant) and XXXX XXXX (the Associate Appellant) are citizens of China. They are appealing a decision of the Refugee Protection Division (RPD) dated May 23, 2019, denying their claims for refugee protection.
- [2] The Appellants submit that the RPD erred by finding they were not being sought by the Chinese authorities. The Appellants make a further submission that the RPD made an error by finding that the Appellants could return to China and practice Falun Gong safely. They do not provide any new evidence and do not request a new hearing before the Refugee Appeal Division (RAD).

DETERMINATION

- [3] Pursuant to paragraph 111(1)(a) of the Immigration and Refugee Protection Act (IRPA), the RAD confirms the determination of the RPD that the Appellants are neither Convention refugees nor persons in need of protection and dismisses the appeal. Background of the Claim
- [4] The Appellants alleged before the RPD that they began to practice Falun Gong in XXXX 2015 in order to improve their respective health. At first, they began to practice at home, and within a few months began to attend a group practice. In XXXX 2016, the father and son were informed by their wife/mother that she believed something bad was going to happen. She wanted them to end their practice of Falun Gong. The Appellants did not want to end their practice and instead sought the assistance of a smuggler to come to Canada. They arrived in XXXX of 2017.

- [5] After their arrival in Canada, their group practice was raided. The Appellants' family home was visited by the Public Security Bureau (PSB). Their wife/mother was informed they were wanted for Falun Gong activities. The Appellants made a claim for refugee protection in XXXX of 2018, fearing persecution because of their Falun Gong practice if they were to return to China. Role of the RAD
- [6] When reviewing the RPD decision, the panel is required to independently assess all the evidence and determine whether the RPD erred in relation to each error of law, fact or mixed fact and law. For this assessment, the panel has applied the standard of correctness as per the Federal Court of Appeal decision in Huruglica.¹ ANALYSIS OF THE MERITS OF THE APPEAL Delay in Claim
- [7] The RPD found the Appellants' 17-month delay in making a claim for refugee protection to be significant. The panel rejected the Appellants' rationale for the lengthy delay in claiming for protection and found that the delay was not "demonstrative of a genuine fear of returning to China."²
- [8] The Appellants were issued Canadian visitor visas in late 2016 and early 2017, respectively.³ They testified that they hired a smuggler to bring them to Canada in XXXX of 2017, because they wanted to be able to continue to practice Falun Gong without the fear of persecution. The Appellants made their claim for protection on XXXX XXXX, 2018.
- [9] The RPD asked the Appellants why they did not make a claim when they first arrived in Canada. The principal Appellant testified that they did not make a claim upon arrival because they were afraid the claim would not be successful and they would be returned to China. The RPD questioned the Appellants why that would be the reason that they did not make a claim for protection. The principal Appellant stated that if he returned to China, he would not be able to practice Falun Gong freely, and could potentially be jailed.
- [10] The RPD noted to the associate Appellant that he was at risk for removal to China at the moment he overstayed his visa, which expired XXXX XXXX XXXX 2017. The principal Appellant testified that he could not extend his visa, because he did not attend the educational institution that he was required to be according to the terms of his visa. He further testified that he had learned about making a claim for protection from the snakehead prior to his departure from China, as well as from various members of his Falun Gong group in Canada. When asked why they made the decision to make a claim for protection in XXXX 2018, the principal Appellant testified that they were more hopeful and if they did not make a claim, they would have no hope at all. The principal Appellant agreed with his son's testimony and added they were afraid of arrest upon return because China arrests practitioners. Both Appellants were asked if they had any other reasons for the delay in making a claim; they testified they did not.
- [11] The Appellants argue that the delay in this case is relevant, but is not sufficient to constitute refusal of the claim. I have reviewed the Record in its entirety and agree that the delay in claim is significant in this particular case. The Appellants testified they left China because

they wanted to go somewhere to practice Falun Gong where their family members would not worry. They also testified that they were informed by the smuggler about the refugee process prior to their departure from China, as well as after their arrival in Canada. The Appellants clearly were aware that they could make claims for protection in Canada, but failed to do so because they were afraid of being returned to China.

- [12] Upon arrival in Canada the associate Appellant failed to attend school, as would have been required by the terms and conditions of his student visa. This meant that he would have been at risk for removal essentially upon entry to Canada in XXXX of 2017. His father, would have been without visitor status approximately six months later in XXXX of 2017. Despite being out of status, the Appellants' awareness of their ability to claim for protection, as well as their stated fear of removal to China, they failed to make a claim for protection until XXXX of 2018. Furthermore, the Appellants allege that their family was approached by Chinese authorities about their Falun Gong activities in XXXX of 2018, stating that they were wanted for investigation and it still took the Appellants another two months to make a claim.
- [13] While it is true there is mixed direction from the Federal Court on the issue of delay in claiming for refugee protection, I find that in the case at bar, the delay is egregious. The Appellants stated they were specifically leaving China to be able to practice Falun Gong without fear of reprisal; they were aware of the refugee process before their departure from China and spoke about it with fellow practitioners here in Canada after their arrival. Furthermore, the rationale that they were afraid to make a claim because if it was rejected they would be returned to China is nonsensical. The reality is that the Appellants were at risk of removal from the moment they overstayed, or failed to comply with, their respective visa requirements. They then waited an additional two months after finding out they were of interest to the Chinese authorities to make a claim, further adding to the delay. I find that their actions demonstrate a lack of subjective fear and undermine the overall credibility of their allegations of fear.
- [14] The Appellants came to Canada and failed to make a claim for protection at the first reasonable opportunity to do so. They have failed to provide a reasonable explanation for the delay. I find on a balance of probabilities that the Appellants' delay in claiming for protection in Canada connotes a lack of subjective fear and I find in this case is sufficient to reject the claim outright. I also make the following alternative credibility findings. Are the Appellants wanted in China?
- [15] The Appellants submit that the RPD erred by finding that they are not wanted by the PSB in China. After a review of the Record, I disagree. The Appellants testified that their group practice was raided before the PSB attended their home on XXXX XXXX XXXX 2018. The RPD questioned the Appellants why the PSB would attend their home, they testified that it was because the group practice was raided and they were identified as practitioners. The RPD asked the Appellants why after being away from their group practice and in Canada for over a year, they would be identified by other members as current members of the practice group. The Appellants testified that his friend knew he was practicing and maybe was forced

to tell them. They were asked if they had any proof that the PSB attended their home, they stated they did not.

- [16] I agree with the RPD that it is not credible that the Appellants would be identified as group members of a Falun Gong practice group when they had been out of the country for over a year. Furthermore, the Appellant explanation as to why they would be identified was not reasonable. I do not find the fact that a friend knew they were practicing in Canada to be a reasonable rationale for why they would be identified as current members of a practice group in China. I find that the Appellants story as to how they were discovered as Falun Gong practitioners in China to not be credible, and on a balance of probabilities find that their alleged practice of Falun Gong was never reported to the authorities.
- [17] I do however disagree with the RPD's analysis relating to the attendance of the PSB at the Appellants' family home. The RPD found that if the Appellants exited China on their own passports, the authorities would have known through the use of the Golden Shield computer system⁴ that they were no longer in the country. The RPD found that the authorities would not have attended the home on XXXX XXXX XXXX 2018 to arrest the Appellants, because they would have known they were not there.
- [18] I have reviewed the Record in its entirety and find that the RPD erred in its rationale for why the authorities would not have attended the family home in China. I note that the Appellants did not allege that their home was attended for their arrest. Their Basis of Claim (BOC) narrative⁵ and their testimony did note that the PSB attended the family home because someone from their group practice had implicated them after a raid. They also noted that the PSB came to the home to look for Falun Gong materials from overseas. The Appellants did not testify that the PSB attended to affect their arrest. In fact, it appears from the wording of the narrative that they did attend knowing that there was the possibility of materials from outside the country, therefore indicating that they knew the Appellants were outside the country. Although I find that the RPD made the finding in error, I do note that I have already found on a balance of probabilities that the visit from the PSB did not occur.
- Falun Gong Identity
- [19] The RPD found that the Appellants had basic knowledge of the practice of Falun Gong, and were able to explain the concepts of righteous thoughts. The RPD did not make a direct finding on whether or not the Appellants were genuine Falun Gong practitioners. They did find however, that the vast majority of practitioners are able to practice in China without fear of reprisal from the authorities. However, basic knowledge of the practice, in light of the above credibility concerns, does not alone establish the genuineness of the Appellants' claim.
- [20] The Appellants argue that the RPD erred in finding that they could practice Falun Gong discreetly, and this was a failure to properly apply the definition of Convention Refugee. While I agree with the RPD that Falun Gong is not a religion, but a cultivation practice, I believe that the RPD erred in its assessment of the evidence about the practice in China.

- [21] I have reviewed the Record and the documentary evidence and note that while there is some evidence that indicates what the RPD has stated, it is much more mixed than what the panel has stated in its reasons. The same document the panel quotes notes the following: The government has since pursued a campaign of extensive, systematic, and, in some cases, violent efforts to pressure practitioners to renounce their belief in and practice of Falun Gong. There are reports of some Falun Gong practitioners being detained and sentenced to long prison terms often in high security psychiatric hospitals. Detained practitioners are reportedly subjected to various methods of physical and psychological coercion in attempts to force them to renounce their beliefs and practice. Reports have also cited allegations of torture and other ill treatment including organ harvesting.⁶ As noted, the documentary evidence on the persecution of practitioners of Falun Gong in China is mixed. Whether an individual practitioner is of interest to the authorities appears to be based on the activities they take part in. Those active in demonstrations, public practice, handing out materials or recruitment of members are at a higher risk of being arrested and detained.⁷
- [22] While I find that in some cases, an analysis and decision could be made that an individual would not be at risk to practice Falun Gong in China, the RPD would have to review the mixed documentary evidence, as well as the profile of the particular Appellants in their decision. This was not done in this case and does constitute an error. I will not perform this analysis for the Appellants, as I have outlined above that they have shown a lack of subjective fear, as well as a lack of overall credibility. I have found on a balance of probabilities that the Appellants are not genuine Falun Gong practitioners due to concerns I have outlined above. Therefore, an analysis of their risk is not required. Sur Place Claim
- [23] The RPD noted that the Appellants had attended some Falun Gong demonstrations, and two photos were provided as documentary evidence.⁸ They also provided a letter from a fellow practitioner in Canada.⁹ The panel found this was insufficient evidence to support an allegation that the Appellants' activities in Canada had come to the attention of the Chinese authorities.
- [24] I note that the photographs are two undated photos of the Appellants holding a banner. The letter is a letter is from a practitioner that is unsigned and not notarized. The author of the letter did not appear as a witness. Furthermore, the Appellants allege that the PSB attended the family home in XXXX of 2018, long after they allegedly began practicing Falun Gong in Canada, and the authorities did not mention their practice in Canada during their home visit. I agree with the RPD that the Appellants have not provided sufficient evidence to support an allegation of a sur place claim.

CONCLUSION

- [25] I have found, after conducting an independent assessment of the evidence, that the Appellants lack a subjective fear of persecution, are not genuine practitioners of Falun Gong, and they are not wanted by the Chinese authorities for Falun Gong activities in China. I make a further finding that there is not a serious possibility that they would be persecuted

should they return to China, nor would they be subjected personally, on a balance of probabilities, to a risk to life, a risk of cruel and unusual treatment or punishment, or a danger of torture, should the Appellants return to China.

- [26] The appeal is dismissed. Pursuant to subsection 111(1)(a) of the IRPA, the RAD confirms the decision of the RPD. (signed) Kimberley Foreman Kimberley Foreman July 28, 2020 Date 1 M.C.I. v. Huruglica, Bujar (F.C.A., no. A-470-14), Gauthier, Webb, Near, March 29, 2016, 2016 FCA 93. 2 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, p. 6. 3 Exhibit RPD-1, RPD Record, Exhibit 1, pp. 73 and 122. 4 National Documentation Package (NDP) for China, 20 December 2019, item 10.4. Immigration and Refugee Board of Canada (IRB), Response to Information Request (RIR), CHN104762.E. 7 March 2014. 5 Exhibit RPD-1, RPD Record, Exhibit 2.1, p. 29. 6 NDP for China, 20 December 2019, item 1.7. Country Policy and Information Note. China: Falun Gong. Version 1.0. United Kingdom. Home Office. November 2016. 7 Ibid. 8 Exhibit RPD-1. RPD Record, Exhibit 4, p. 189. 9 Ibid., p. 194.

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