

CANADA / JUDGMENT

TB8-01856

COURT

Refugee Appeal Division

DECIDED

25 June 2020

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RAD File / Dossier de la SAR : TB8-01856 TB8-01857 / TB8-01858 Private Proceeding / Huis clos
Redetermination of the Appeal - Nouvelle décision relative à l'appel Reasons and decision ? Motifs
et décision Persons who are the subject of the appeal XXXX XXXX XXXXXXXXXXX XXXX XXXXXXXXXXX
XXXX Personnes en cause Appeal considered / heard at Toronto, ON Appel instruit / entendu à
Date of decision June 25, 2020 Date de la décision Panel M. Lee Tribunal Counsel for the persons
who are the subject of the appeal Adam Wawrzkievicz 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 OVERVIEW

- [1] XXXX XXXX (Principal Appellant), XXXX XXXX (Second Appellant), and XXXX XXXX (Third Appellant), citizens of China. appealed a decision of the Refugee Protection Division (RPD), dated November 17, 2017, rejecting their claim for refugee protection.

DETERMINATION

- [2] The appeal is allowed. The Refugee Appeal Division (RAD) substitutes its own decision that the Appellants are Convention refugees.

BACKGROUND

- [3] The Appellants allege to fear persecution in China because of their affiliation with Falun Gong. The Appellants came to Vancouver, Canada illegally through the United States border on XXXX XXXX, 2014, and made their refugee claims shortly afterward.
- [4] The RPD heard their claims on September 5, 2017 and rejected their claims on November 17, 2017, on the determinative issue of credibility. The RAD initially dismissed the Appellants' appeal on February 4, 2019. The Appellants then appealed the decision to the Federal Court. The Federal Court granted the Appellants' judicial review application on November 28, 2019, to be remitted before a differently constituted RAD panel.
- [5] The RAD is now considering the merits of the Appellants' appeal for the second time. Role of the RAD

- [6] According to the Federal Court of Appeal's ruling in *Huruglica*,¹ the RAD will review decisions of the RPD on a standard of correctness after conducting an independent analysis of the evidence.

ANALYSIS

No new evidence and no oral hearing request from current counsel

- [7] The Appellants had two different counsel for the first and second appeals before the RAD, with two different memorandums. In the analysis below, the RAD will consider both sets of arguments from both counsels.
- [8] The Appellants did not submit any new evidence nor did they request an oral hearing at the time of their second appeal. New evidence from counsel
- [9] Through their first counsel, the Appellants did not make an application under subsection 110(4) of the Immigration and Refugee Protection Act (IRPA). However, they submitted a Rule 29 application as late evidence at the time of the initial appeal. Since this evidence is no longer late evidence at the time of the current appeal, the RAD will consider this evidence under the criteria of subsection 110(4). Translator mistakes from RPD hearing
- [10] In order for the new evidence to be accepted, it must have arisen after the rejection of the claim, it must not have been reasonably available at the time of rejection; or it was not reasonable to expect the Appellants to have provided this evidence at the time of rejection. At least one of these criteria must be met in order for the new evidence to be accepted. This is in accordance with subsection 110(4) of the IRPA.
- [11] As new evidence, the Appellants are submitting a list of translation mistakes which have been verified by a different interpreter.² This document is also accompanied by an affidavit signed by this current interpreter, affirming their ability to interpret and understand both languages. At the hearing, neither the Appellants nor the translator indicated any concern for translation. The Appellants were represented by the same counsel at the RPD hearing and on the first initial appeal. No request was made at the end of the hearing for an audit of the translation. However, there is no explanation regarding when or how these translation errors came to light, or why they could not have been provided at the time of rejection. It is the Appellants' burden to prove why new evidence should be admitted. The RAD finds that it is unclear when these errors came to the Appellants' attention if not at the hearing, why this translation was not reasonably available at the time, or why the Appellants could not have provided it at the time of rejection. Therefore, the translation document is rejected under subsection 110(4).
- [12] As the new evidence is rejected, the RAD has no jurisdiction to hold an oral hearing pursuant to subsection 110(6) of the IRPA. RPD erred in drawing negative credibility finding on lack of summons

- [13] The RPD found that it was reasonable to expect that a summons should have been given to the Appellants, since they were wanted by the authorities for Falun Gong.³ The Appellants indicated that the Public Security Bureau (PSB) had been to their home five to six times.⁴ The RPD found it questionable why the Third Appellant would not ask her father about whether a summons was left behind or not, since it was reasonable to ascertain as much information as possible.⁵
- [14] The Appellants submit that unless there are valid reasons to question the Appellants' credibility, it is an error for the RPD to require documentary evidence to corroborate allegations.⁶ The RPD cannot disbelieve a claim merely because the claimant presents no documents.⁷ Furthermore, in its decision, the RPD found that summonses are "often" left with or shown to the family.⁸ Therefore, the RPD's own cited evidence indicates that there are times when a summons is neither left nor shown.⁹
- [15] The RAD has considered all of the evidence and has listened to the audio recording of the hearing, and agrees with the Appellants. At the hearing, the Appellants did not give any inconsistent evidence regarding the police raid, their participation in the Falun Gong group, how some of the members of their group were arrested, and that they were in hiding. Therefore, there is no reason to doubt that the Appellants were members of this group, and that the group was raided. Implausibility findings can only be made in the clearest of cases, and the RAD does not find that this is one such case. According to the documentary evidence, the PSB has the discretion regarding whether or not they wish to issue a particular type of summons.¹⁰ This is not within the control of the Appellants. The Appellants should not be held accountable for whether the PSB wished to issue a summons or not. Therefore, the RAD finds that the RPD's finding regarding the implausibility of exiting China without a summons issued, while being a person of interest to the PSB, is in error. RPD erred in finding it implausible that Appellants could leave China on own passports
- [16] The RPD found that the Third Appellant's testimony regarding how she left China on her own passport to be vague and lacking in specificity.¹¹ The RPD relied on the Jurisprudential Guideline (JG) to support its findings on the implausibility of leaving China as a person of interest to the PSB.¹² The RPD also referenced the documentary evidence which indicates that passports are examined more than once, and the Chinese authorities have the ability to monitor the exit of their cities, and have access to eight public security databases.¹³ The RPD preferred the unbiased country conditions to the Appellants' testimony.¹⁴
- [17] The Appellants submit that the RPD's conclusion that they could not leave on their own passports if they were sought by the PSB has been found to be unreasonable by the Federal Court in the recent case of Huang.¹⁵ The Appellants submit that it is plausible for someone to leave China on their own passport, and this should be decided on a case by case basis, rather than making a blanket implausibility finding.¹⁶ The Appellants submit that the RPD made references to vague testimony and did not explain which parts were vague or lacking.¹⁷

- [18] The RAD agrees with the Appellants. At the time of this appeal, the JG has been revoked.¹⁸ The RPD relied on a portion of the JG in its decision. Although this portion of the RPD's decision is now in error, the RAD will still assess the rest of the RPD's analysis, as well as the objective evidence available, regarding the Appellants' ability to exit China, in spite of the Principal and Third Appellants being persons of interest to the authorities.
- [19] In its decision, the RPD did not give any examples of where the Appellants' testimony was vague or lacking, and so this finding was unclear. In reviewing the audio recording of the hearing, the RAD finds that the Appellants answered the RPD's questions about their use of the smuggler, and their travel journey in a straightforward manner. The Third Appellant explained that she gave the smuggler their passports and the smuggler submitted these documents at the time they were scanned.¹⁹ The smuggler did not travel with them to the United States, but a second smuggler was in the United States to meet them, and assist them in travelling from the United States to Canada.²⁰ When the RPD asked the Appellants to clarify their responses, they did so.
- [20] In the Appellants' second memorandum provided by their second counsel, they indicate that where there is evidence of corruption and bribery, it is incumbent on the RPD to explain why these factors could not overcome the Golden Shield in any given case.²¹ The RPD failed to do so in its decision. The RAD agrees with the Appellants. The documentary evidence indicates that government officials are prone to bribery. No findings were made by the RPD on why bribery or successful attempts to smuggle wanted persons through airports through personal connections would be implausible in light of the corruption within Chinese government officials. The documentary evidence further indicates that bribery continues to be a serious problem in China in spite of efforts to enforce the law. In March 2015, there were 41,487 persons charged for corruption or dereliction of duty.²²
- [21] The RAD also notes that the Appellants were not issued summonses, and so the RAD finds that it is uncertain whether or not the Appellants' names would show up on the public databases, even if visits were made to their homes. The RAD finds that the Appellants' testimony is consistent with the documentary evidence regarding the plausibility of corruption and bribery, and so the RAD finds that in this particular case, it was not implausible that their smuggler was able to assist them safely out of China, in spite of the Appellants being persons of interest to the PSB. Therefore, the RPD's finding is in error. RPD erred in rejecting sur place claim
- [22] The RPD found that there was no indication that police or agents of police were still seeking the whereabouts of the Appellants since their departure from China.²³ The Second Appellant is not a Falun Gong practitioner. The RPD found that there was no evidence to indicate that the Appellants' involvement in the Falun Gong community in Canada has come to the attention of the authorities in China.²⁴ The RPD relied on its findings that the Appellants did not practice Falun Gong in China because of their inability to exit China as wanted persons and its earlier findings.²⁵ The RPD concluded that the Appellants were not genuine practitioners in Canada on a balance of probabilities.²⁶

- [23] The Appellants submit that where the RPD makes cumulative negative credibility findings which are found to be in error, the decision must be overturned.²⁷ Furthermore, the RPD did not come to any conclusion on the Appellants' knowledge of Falun Gong in its decision.²⁸
- [24] The RAD agrees with the Appellants. The findings on exit and the lack of summons have already been found to be in error for the above stated reasons. The RPD relied almost entirely on these findings in its decision, and so the RAD finds that the cumulative findings for the sur place claim are in error.
- [25] Also, the RAD also conducted its own independent assessment of the Appellants' knowledge of Falun Gong practice. The RAD finds that the Appellants demonstrated an adequate level of knowledge for the years that they allege to be have been practicing. The Principal and Third Appellant explained that they participated regularly in group practice exercise sessions, parades, and weekly study groups since coming to Toronto.²⁹ At the hearing, the Third Appellant was able to correctly describe the concept and purpose of a law wheel.³⁰ The Principal Appellant was able to correctly explain the hand positions used for righteous thoughts, and its purpose.³¹ The Principal Appellant also spoke about karma, and the consequences when a law wheel becomes deformed.³² The Principal Appellant also described how the exercises helped improve his mental state, and why he continued to practice Falun Gong even after his depression lifted.³³
- [26] The documentary evidence confirms that Falun Gong continues to be vilified by the Chinese government as an "evil cult" and Falun Gong members are arrested and tortured.³⁴ The RAD finds that this is consistent with the Appellants' understanding of the treatment of Falun Gong practitioners. The documentary evidence also indicates that family members and relatives may be detained and questioned in order to expose Falun Gong practitioners.³⁵ The RAD finds that there is an objective basis to the Appellants' fear of persecution. The RAD finds on a balance of probabilities, that the Principal and Third Appellant are credible as genuine Falun Gong practitioners, and they would face a serious possibility of persecution if they were to return to China. The Second Appellant also faces a serious possibility of persecution because of his familial connection to them. No state protection
- [27] Falun Gong practitioners are subject to persecution in China by state authorities if found to be practicing. This includes brain transformation class to criminal prosecution.³⁶ The RAD finds that that the Appellants have rebutted the presumption of state protection, as there is no adequate state protection for the Appellants, on a balance of probabilities. No internal flight alternative
- [28] As the state is the agent of persecution, the RAD finds that there is a serious possibility of persecution throughout the country, and there is no safe or reasonable internal flight alternative. In summary

[29] The RAD has carefully considered all of the evidence in this appeal. The RAD finds that the majority of the RPD's findings are in error for the above reasons. The Appellants were generally credible in their allegations, and their allegations are consistent with the documentary evidence. The Principal and Third Appellant are Convention Refugees because of their affiliation with Falun Gong, and the Second Appellant is a Convention Refugee because of his association with them. Therefore, the RAD finds that that the RPD's decision is in error.

CONCLUSION

[30] The appeal is allowed. The RAD substitutes its own decision that the Appellants are Convention refugees. (signed) "M. Lee" M. Lee June 25, 2020 Date 1 Canada (Citizenship and Immigration) v. Huruglica, [2016] 4 FCR 157, 2016 FCA 93, paragraph 78. 2 Exhibit P-3, Documents or written submissions not previously provided. 3 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 8, paragraph 23. 4 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 8, paragraph 21. 5 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 7, paragraph 20. 6 Exhibit P-2, Appellant Record, Appellant's Memorandum, at page 18, paragraph 9. 7 Ibid. 8 Exhibit P-2, Appellant Record, Appellant's Memorandum, at page 19, paragraph 14. 9 Exhibit P-2, Appellant Record, Appellant's Memorandum, at page 19, paragraph 15. 10 Exhibit RPD-1, RPD Record, Exhibit 5, National Documentation Package (NDP) for China, version 20 July 2017, item 9.22, Response to Information Request, CHN104188.E, 30 November 2012. 11 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 8, paragraph 25. 12 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 9, paragraph 28; Jurisprudential Guide - Decision TB6-11632, Guide identified by the Chairperson pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act, Effective date July 18, 2017, revoked on June 28, 2019. 13 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 10, paragraph 31. 14 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 11, paragraph 36. 15 Exhibit P-2, Appellant Record, Appellants' Memorandum, at page 23, paragraph 21 ; Huang v. Canada (Citizenship and Immigration Canada), 2017, FC 762 (CANLII), at paragraph 68. 16 Exhibit P-2, Appellant Record, Appellants' Memorandum, at page 23, paragraph 24. 17 Exhibit P-2, Appellant Record, Appellants' Memorandum, at page 23, paragraph 23. 18 Jurisprudential Guide - Decision TB6-11632, Guide identified by the Chairperson pursuant to paragraph 159(1)(h) of the Immigration and Refugee Protection Act, Effective date July 18, 2017, revoked on June 28, 2019. 19 RPD Hearing Recording, September 5, 2017, at 1:33:13. 20 RPD Hearing Recording, September 5, 2017, at 1:36:37. 21 Exhibit P-4, Second Appellants' Memorandum dated February 10, 2020, page 10, paragraph 23. 22 Exhibit RPD-1, RPD Record, Exhibit 5, National Documentation Package (NDP) for China, version 20 July 2017, item 7.8, China. Bribery and Corruption 2016, 3rd Edition, Global Legal Insights 16 November 2016, at page 2. 23 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at pages 11-12, paragraph 39. 24 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 12, paragraph 40-42. 25 Exhibit RPD-1, RPD Record, RPD Reasons and Decision, at page 12, paragraph 43. 26 Exhibit

RPD-1, RPD Record, RPD Reasons and Decision, at page 12, paragraph 44. 27 Exhibit P-2, Appellant Record, Appellants' Memorandum, at page 24, paragraph 28. 28 Exhibit P-2, Appellant Record, Appellants' Memorandum, at page 17, paragraph 4. 29 RPD Hearing Recording, September 5, 2017, at 1:38:04. 30 RPD Hearing Recording, September 5, 2017, at 1:41:10. 31 RPD Hearing Recording, September 5, 2017, at 2:03:00. 32 RPD Hearing Recording, September 5, 2017, at 1:58:17. 33 RPD Hearing Recording, September 5, 2017, at 2:02:03. 34 Exhibit RPD-1, RPD Record, Exhibit 5, National Documentation Package (NDP) for China, version 20 July 2017, item 12.28, Response to Information Request, CHN105282.E, 14 October 2015, at page 2. 35 Exhibit RPD-1, RPD Record, Exhibit 5, National Documentation Package (NDP) for China, version 20 July 2017, item 12.27, Response to Information Request, CHN104580.E, 18 October 2013, at page 2. 36 Ibid.

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