

CANADA / JUDGMENT

TB6-08426

COURT

Refugee Appeal Division

DECIDED

13 September 2016

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Immigration and

Refugee Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD File No. / N° de dossier de la SAR :

TB6-08426

TB6-08427

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Person(s) who is(are)

the subject of the appeal

XXXX XXXX

(a.k.a. XXXX XXXX)

XXXX XXXX

Personne(s) en cause

Appeal considered / heard at

Toronto, Ontario

Appel instruit à

Date of decision

September 13, 2016

Date de la décision

Panel

Roslyn Ahara

Tribunal

Counsel for the person(s) who is(are)the subject of the appeal

Diane B. Coulthard

Barrister and Solicitor

Conseil(s) du (de la/des)

personne(s) en cause

Designated Representative(s)

N/A

Représentant(e)(s) désigné(e)(s)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

- [1] XXXX XXXX (the principal Appellant) and her husband XXXX XXXX (the associated Appellant), both citizens of the People's Republic of China, are appealing the decisions of the Refugee Protection Division (RPD) denying their claims for refugee protection. They have not submitted any new evidence in support of their appeals, nor are they requesting that the Refugee Appeal Division (RAD) conduct an oral hearing. The Appellants are, however, asking the RAD to substitute a positive determination, or in the alternative, to remit the matter to a newly constituted panel of the RPD for re-determination.

DETERMINATION

- [2] Pursuant to section 111(1)(c) of the Immigration and Refugee Protection Act (IRPA), the RAD allows this appeal. This matter is remitted to the RPD for re-determination by a newly constituted panel of the RPD.

Background

- [3] The principal Appellant began practicing Falun Gong (FG) in XXXX 2014, because a friend had told her that it could help with menopause symptoms. Her husband began practicing in XXXX 2015 due to stomach problems.
- [4] In XXXX 2014, the principal Appellant joined her practice group. She also practiced at home and studied Zhuan Falun; her husband joined the group practice in XXXX 2015.
- [5] However, on XXXX XXXX, 2015, the Appellants' practice group was raided by the Public Security Bureau (PSB). The Appellants were able to escape to the home of a cousin. On XXXX XXXX, the PSB went to their home. They left a summons and returned to the house on subsequent occasions searching for the Appellants. The Appellants also learned from their daughter that the PSB had arrested two fellow practitioners.
- [6] With the help of a smuggler, the Appellants left China on XXXX XXXX XXXX 2016. They fear that the PSB officials will arrest them due to their illegal FG activities.

ROLE OF RAD

- [7] The Appellants have made submissions which are in line with the recent Federal Court of Appeal decision, in *Huruglica*. 1 The RAD finds that it provides us with guidance in relation to the appropriate standard that must be applied by a specialized tribunal such as the RAD to decisions of a first-level administrative tribunal. The justices stated at paragraph 103:
 - [103] I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

SUBMISSIONS BY THE APPELLANTS

- * Did the RPD fail to observe a principle of natural justice or otherwise acted beyond or refuse to exercise its jurisdiction?
- * Did the RPD err in law in making its decision, whether or not the error appears on the face of the record; or

* Did the RPD base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it?

The Appellants' travel to Canada

- [8] The RPD found that in spite of assistance from a smuggler, their ability to exit China using their own genuine passports was called into question. It cited the National Documentation Package (NDP) which outlines the controls in place to monitor individuals exiting China.
- [9] It is submitted that the RPD also had "unbiased" documentary evidence before it which support the Appellants' allegations as well as recent Federal Court case law. The articles submitted indicate that the United Nations points to gangs of human smugglers who illegally transit Chinese migrants through the airport at Hong Kong.
- [10] Further, the Appellants submitted that the Federal Court has held in Ren², Zhang³ and Sun⁴ that it is not implausible that a person could leave China on his or her own passport with the assistance of a smuggler who bribed the appropriate person. Accordingly, the Appellants submitted that the RPD's finding that it was implausible is equally questionable.
- [11] The RAD concurs with the RPD with its finding surrounding this issue. The RAD also notes from its own review and assessment of the evidence that the Exit and Entry Administration Law of China, which came into force on July 1, 2013, states the following:⁵

(...) Article 11. Chinese citizens who exit or enter China shall submit their exit/entry documents such as passports or other travel documents to the exit/entry border inspection authorities for examination, go through the prescribed formalities, and may exit or enter upon examination and approval.

Article 12. Under any of the following circumstances, Chinese citizens are not allowed to exit China:

(...) are suspects or defendants in criminal cases;

(...) If a foreigner or a Chinese citizen must be prevented from leaving China at a border control station, the people's court accepting the case shall report up the hierarchy to the High People's Court, and a written notification of preventing person from departing through entry-exit port shall be issued by the Highest People's Court, and work with the public security organ of the corresponding level for handle control formalities. If the control port is not within the same province, autonomous region, or municipality directly under the central government, the public security organ in the relevant province, autonomous region, or municipality directly under the central government shall be contacted for the handle control formalities. Under emergency situations, if necessary, may first have the border control prevent departure and complete control formalities later. (China 20 Dec. 2012, Art. 404).

[12] The RAD also notes that the documentation states that security officials have access to the Public Security Bureau of China's online database of citizens who have been convicted of crimes or are wanted by the authorities (also known as Policenet or the Golden Shield).

(...) Information Sharing by Public Security Officials

In 10 February 2014 correspondence with the Research Directorate, the Executive Director of the Dui Hua Foundation affirmed that airport security officials have access to the Public Security Bureau of China's online database of citizens who have been convicted of crimes or are wanted by the authorities [also known as Policenet or the Golden Shield]. Similarly, the representative of the Laogai Research Foundation stated that reports on "experiences of activists who have been detained while trying to board an international flight provide clear evidence that airport officials are connected to Policenet" (26 Feb. 2014). A colleague of Cao Shunli, who was also prevented from travelling to Geneva for the human rights training in September 2013, later publicized her own experience at the airport in Guangdong (HRIC 11 Oct. 2013). According to the Laogai research Foundation, the colleague indicates that when her passport was swiped by airport authorities,

scanning equipment immediately made noises alerting airport officials that she was wanted by police. She was subsequently detained in the Guangdong Baiyun Airport and told that Shanghai police would not let her leave. She was then transported from Guangdong to Shanghai for detention and questioning. This woman's experience provides concrete evidence of airport officials coordinating with police departments in tracking and detaining a political dissident. (26 Feb. 2014)⁶

4. Security and Exit Control Procedures

The representative of the Laogai Research Foundation wrote that the Chinese government checks the passports of citizens attempting to leave the country in order to ensure that they are suitable for foreign travel. Customs officials stamp the passports of citizens approved for foreign travel. Public security officials often confiscate passports held by individuals deemed unsuitable for foreign travel. (23 Feb. 2014).⁷

[13] An undated article on the website of the Ministry of Public Security, entitled: "Deepening the Implementation of the 'Golden Shield' Project" states that:

all police units nationwide have access to eight public security databases, including the "National Basic Population Information Database" (China n.d.). Also accessible through the databases is information on household registration [hukou], border exit and entry, road traffic, and criminal investigations (ibid.).⁸

[14] In particular, the RAD notes that the system has been used to track down Falun Gong practitioners. The Chinese economist writing in Open Magazine affirms that:

...Cisco's Policenet has been helping the [Chinese Communist Party]'s public security organs to ferret out political dissidents and Falun Gong practitioners for years (17 Feb. 2010).⁹

[15] In addition, the representative of the Laogai Research Foundation provided the following information:

The Golden Shield incorporates extensive tracking and control mechanisms such as real-name online registration requirements, GPS monitoring, and facial recognition surveillance technology in a multi-pronged approach to identify potentially disruptive individuals. Policenet, a component of the Golden Shield, stores a wealth of information on Chinese citizens and connects the various agencies and levels of command within the public security apparatus. This integrated system enables Chinese public security forces to effectively target and neutralize political dissidents. (26 Feb. 2014)¹⁰

[16] According to a Canadian embassy official in Beijing, a traveller will pass through four points: a check-in counter, a security checkpoint for entry into the airport's secure zone, departure immigration where border authorities are located, and the boarding gate; at each of the points, the traveller's passport may be checked, with scanning occurring at the check-in counter and the immigration checkpoint.¹¹ Another source cited in the NDP, an assistant director for aviation security at the International Air Transport Association ("IATA"), indicates that three checkpoints exist, without making reference to the boarding gate, and states that a traveller's passport is checked at each of these locations.¹² The IATA official also noted that specific departure procedures vary at each airport, but that the general procedures are consistent.¹³

[17] The NDP also indicates that freedom to exit China is not absolute.¹⁴ Under Article 12 of the Exit and Entry Administration Law of China, exit from the country is denied under certain circumstances, including instances where the citizen does not hold valid exit documents, or is a suspect or defendant in a criminal case.¹⁵ Chinese border authorities have also effectively implemented exit control measures, although there are isolated incidents of successful evasion¹⁶ and it appears that the database is automatically searched when border authorities scan a passport.¹⁷

[18] The Appellants relies on recent Federal Court decisions in Zhang, Sun and Ren to support their argument that the RPD's finding is unreasonable.

[19] The RAD is not persuaded by the Appellants' argument in this regard. The RAD finds that the facts in Zhang, Sun and Ren can be distinguished from the facts in the present case in that the Appellants' testimony was that they just followed the smuggler and was unaware of their surroundings.

[20] The RAD also finds that the Appellants' evidence of the smuggler was vague and lacking detail. The RAD finds it is reasonable to expect that an individual who is trying to avoid arrest and detention by leaving the country would want to know what services the smuggler they were engaging was able to provide and what steps would be taken to ensure their safe passage from China. The RAD finds it makes little sense that the Appellants would simply put their lives in the hands of an unknown smuggler without receiving detailed information on the plan that was to be undertaken to exit the country. The RAD finds that the lack of

detail regarding the actions of the smuggler provided by the Appellants undermines their allegations that they were assisted by a smuggler to bypass security in China.

- [21] The RAD notes that Zhang can be distinguished from the present case. In the Zhang matter, the reviewing court took exception to the RPD's findings when it concluded that possible hundreds of officials had to be bribed to facilitate undetected departure from China. The RAD notes that in the case at hand, the RPD did not engage in the speculation that hundreds of officials would have to be bribed. More importantly, the decision in Zhang was based on the documentary evidence that existed in 2008 and made no reference to the Golden Shield Project which was relied upon by the RPD in this case.
- [22] The RAD notes that while the Federal Court decision in Sun was determined in March 2015, it was relative to a decision of the RPD that was made in November 2013. A review of that RPD's decision reveals that the decision was based on the evidence available in the October 2012 NDP. In the Sun matter, the reviewing court made reference to the RPD's reliance on an Information Request reporting the existence and expansion of a national Chinese policing database used by the PSB and at ports of entry and exit of the country and that the same document also mentions that challenges remain with respect to information sharing between regional police units.
- [23] The RAD notes, however, the conclusions drawn about the plausibility of the Appellants' being able to leave China on their own passports in the present case is based on the most current information in the NDP. The RAD notes that in 10 February 2014 correspondence with the Research Directorate, the Executive Director of the Dui Hua Foundation affirmed that "airport security officials have access to the Public Security Bureau of China's online database of citizens who have been convicted of crimes or are wanted by the authorities [also known as Policenet or the Golden Shield]" and that there is concrete evidence of airport officials coordinating with police departments in tracking and detaining wanted persons.¹⁸
- [24] The RAD also finds that suggestion, as set out in Zhang and Ren, that bribing "one person with a computer would be sufficient" to allow the Appellants to exit China without difficulty is not applicable in the circumstances of this case. The RAD finds that the suggestion implies that one bribe could facilitate the removal of police interest from the Golden Shield computer system. If the smuggler was able to bribe an official to alter computerized records of the police interest in the Appellants, the RAD finds it makes little sense that the smuggler would place him or herself at risk by accompanying the Appellants through the airport and onto the aircraft when there was no need.
- [25] Furthermore, the RAD finds that evidence reveals that the Golden Shield system is an intensive security apparatus that is far-reaching and encompassing. The RAD finds that given the importance of this system to Chinese authorities in monitoring its citizens, it is reasonable to expect that the use of the apparatus is also monitored and that there are redundant systems in place to prevent the system from being compromised by a single

individual. In addition, the RAD notes that the Appellants have alleged that the PSB have continued to pursue them after their departure from China. The RAD finds that this allegation undermines the suggestion that their names were somehow removed from computer system.

- [26] The RAD also notes that the evidence suggests that the Appellants' passports were examined numerous times. The RAD finds it highly improbable that the smuggler would have the prior knowledge of who to bribe in order to facilitate safe travel through each checkpoint. The RAD also notes that Article 51 of the Exit and Entry Administration Law of the People's Republic of China requires that companies involved in the transportation of goods and passengers in and out of Chinese ports must declare information on the goods and passengers in advance of their departure or entry to the country.¹⁹ Chinese border authorities are provided what is described as "advance passenger information" on arriving and departing passengers.²⁰ This information contains a number of details of that passenger, including full name, date of birth, gender, nationality, country of residence, travel document type, and passport number, expiry date, and issuing country.²¹ With respect to flights into the country, it appears that China maintains a "stop list," which bars the passenger from boarding the aircraft; however, the NDP remains silent on whether a similar list exists for outbound flights.²² In any event, it is evident that border authorities are provided detailed information on the passengers aboard outbound flights.

US visa

- [27] The RPD noted the testimony of the Appellants in which they indicated that they had obtained US visas in XXXX 2015, with the intention of leaving China. They appeared in person and testified that they encountered no problems in procuring the visa. The RPD noted that all US visa recipients undergo security checks²³ and if they were wanted by the PSB, this would preclude obtaining a US visa.
- [28] It is submitted that the Appellants testified that the smuggler obtained their US visas on their behalf, and given the prevalent bribery in China, it is submitted that the smuggler could easily have ensured the appropriate Chinese authorities approved the US security checks to enable to the Appellants to receive their US visas.
- [29] Given the RAD's decision to remit this matter to the RPD, it declines to comment on this issue.

Summons

- [30] The RPD noted the summons, as a single page with black ink and red stamps, and therefore, easily made by anyone, anywhere. Coupled with this, the RPD noted the prevalence of fraudulent documents in China. It, therefore, found the summons, on a balance of probabilities, to be fraudulent and, therefore, concluded that the Appellants were not wanted by the PSB.

- [31] It is submitted by the Appellants that the RPD erred when it stated that just because fraudulent documents are available from China, that means that every document coming out of China is fraudulent. It is argued that it was incumbent upon the RPD to undertake an independent analysis of each document, particularly where security features are present on the documents.
- [32] The RAD concurs that the RPD erred when it discarded the summons based on the prevalence of fraudulent documents. Having said this, however, the RAD finds that the summons submitted does not conform to the samples in the NDP documentation.²⁴ Specifically, the RAD refers to the print size on the hearings, the stamp not being over signature, etc. There are a number of inconsistencies, which could lead to a finding that the summons is, in fact, fraudulent.

Identity as Falun Gong Practitioners

- [33] The RPD acknowledged the difficulty in assessing the Appellants' genuineness of their FG practice. Having said this, the RPD did draw a negative credibility inference from the principal Appellant's lack of knowledge of the purpose of exercise four, given the fact that she had attended over 40 group sessions. Likewise, with respect to the associated Appellant, who had attended FG practice in China approximately 20 times as well as his activities in Canada, the RPD drew a negative credibility inference from his lack of knowledge of the hand positions for sending righteous thoughts.
- [34] The RPD further noted that although the Appellants had attended FG activities in Canada, including more than 10 study sessions, joining Falun Dafa day parades in Toronto and Ottawa, and handing out pamphlets at the Pacific Mall, they had never approached the Falun Dafa Association of Canada (FDAC). The RPD did not accept the explanation provided by the Appellants that they did not know the directions and no one took them.
- [35] The RPD considered the photographs of the Appellants and others practicing FG and participating in FG events in Canada. However, it assigned little weight in terms of the genuineness of the Appellants' FG commitment, as they are undated and unverifiable. The same applied to the two letters from fellow practitioners in Canada, when they could have been written by anyone from anywhere, and the authors were not present to testify.
- [36] It is submitted that the RPD was overly microscopic in its assessment of both Appellants' knowledge of FG. It is argued that the Federal Court has long held the level of one's religious knowledge does not equate to one's bona fides as a believer. ²⁵
- [37] Moreover, it is submitted that the RPD ought not to have stated that:
- ...on a balance of probabilities that a genuine FG practitioner would have sought out the FDA in Toronto and the Appellants' failure to do so undermines their credibility and identity as practitioners.²⁶

- [38] On the issue of the Appellants' not having approached the Falun Dafa Association, the RAD finds that the RPD was overzealous in its finding in this regard.

Sur Place

- [39] The RPD found that there was insufficient evidence to conclude that, on a balance of probabilities, the Appellants' participation in FG activities in public spaces in Canada had been brought to the attention of Chinese authorities.
- [40] It is argued that the RPD acknowledged the Appellants' practice of FG in Canada, yet found that this has not come to the attention of the Chinese authorities. It is argued that the issue is whether the Appellants can return to China and practice FG openly and freely.

RAD'S FINDINGS

- [41] The RAD finds that although it has no issue with the credibility findings by the RPD, the reasons are insufficiently fulsome to support the conclusion.
- [42] The RAD finds that the determinative issue is whether or not the Appellants were genuine FG practitioners in China, and if so, are they wanted by the PSB. In determining this, it is necessary to examine what allegedly brought them to the attention of the PSB, i.e. the raid, visits by the PSB, the genuineness of the summons on its face, the lack of a coercive summons, in conjunction with the findings with respect to the Appellants' ability to exit China without being detected, if wanted by the PSB.
- [43] If the RPD then finds that the Appellants' are not wanted by the PSB, then it is open to it to import its credibility findings to the allegations of a sur place claim. However, in the absence of fulsome reasons, the RAD finds that the analysis is insufficient to support the outcome.
- [44] The RAD cannot conduct an oral hearing for two reasons. The Appellants have not submitted new evidence pursuant to ss. 110(4) of the IRPA. Secondly, to do so, would require rehearing evidence which the RPD had already heard.
- [45] Accordingly, the RAD remits the matter to a newly constituted panel of the RPD for re-determination. This appeal is allowed.

(signed)

"Roslyn Ahara"

Roslyn Ahara

September 13, 2016

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 Ren, Fei Hu v. M.C.I. (F.C., no. IMM-1558-15), Boswell, December 18, 2015, 2015 FC 1402.
- 3 Zhang, Xiu Jie v. M.C.I. (F.C., no. IMM-2703-07), Dawson, April 23, 2008, 2008 FC 533.
- 4 Sun, Hongxin v. M.C.I. (F.C., no. IMM-8088-13), de Montigny, March 27, 2015, 2015 FC 387.
- 5 Exhibit RPD-1, RPD's Record, NDP for China (April 29, 2016), item 14.3.
- 6 Ibid.
- 7 Ibid.
- 8 Exhibit RPD-1, RPD's Record, NDP for China (April 29, 2016), item 10.4.
- 9 Ibid.
- 10 Ibid.
- 11 Ibid., item 3.24, section 3.1.
- 12 Ibid.
- 13 Ibid.
- 14 Exhibit RPD-1, RPD's Record, NDP for China (April 29, 2016), item 14.3.
- 15 Ibid., at p.1.
- 16 Ibid. at pp.2-7
- 17 Ibid. at p.6.
- 18 Exhibit RPD-1, RPD's Record, NDP for China (April 29, 2016), item 14.3.
- 19 Exhibit RPD-1, RPD's Record, NDP for China (April 29, 2016), item 14.11.
- 20 Ibid., item 14.15, at pp. 2-4.
- 21 Ibid. at p. 3.
- 22 Ibid. at p.5.
- 23 Exhibit RPD-1, RPD's Record, NDP for China (April 29, 2016), item 14.9.
- 24 Ibid., item 9.3 and 9.10.
- 25 Dong, Yi Sheng v. M.C.I. (F.C., no. IMM-3499-09), Kelen, January 20, 2010, 2010 FC 55, para. 20; Ullah, Khan Asad v. M.C.I. (F.C.T.D., no. IMM-5639-99), Heneghan, November 22, 2000, para. 11.
- 26 Exhibit RPD-1, RPD's Record, RPD's Reasons, para. 41.

RAD.25.02 (June 23, 2014)

RAD File No. / N° de dossier de la SAR : TB6-08426

TB6-08427

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