



RAD File No. / N° de dossier de la SAR : TB3-08184

Private Proceeding / Huis clos

2014 CanLII 19381 (CA IRB)

Reasons and decision – Motifs et décision

Person(s) who is(are) the subject of the appeal	XXXX XXXX XXXX (a.k.a. XXXX XXXX)	Personne(s) en cause
Appeal considered / heard at	Toronto, Ontario	Appel instruit à
Date of decision	January 29, 2014	Date de la décision
Panel	L. Favreau	Tribunal
Counsel for the person(s) who is(are)the subject of the appeal	N/A	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 (de la) ministre

Reasons and Decision

[1] XXXX XXXX XXXX (the Appellant) a citizen of China, appeals a decision of the Refugee Protection Division (RPD) denying her claim for refugee protection. She has submitted new evidence in support of her appeal. The Appellant asks that the Refugee Appeal Division (RAD) set aside the decision of the RPD and substitute its own determination that the Appellant is a Convention refugee or a person in need of protection.

DETERMINATION

[2] Pursuant to Section 111(1)(a) of the *Immigration and Refugee Protection Act* (IRPA), the RAD confirms the decision of the RPD that the Appellant is neither a Convention refugee nor a person in need of protection. This appeal is dismissed

Background

[3] The Appellant alleged before the RPD that she began the practice of Falun Gong in XXXX 2012. At that time, the Appellant was experiencing difficulties coping with health issues related to XXXX. The Appellant and a small group of followers would practice Falun Gong in secret locations. On XXXX XXXX, 2013, the Appellant was at her regular group practice when it was raided by members of the Public Security Bureau (PSB). The Appellant was able to escape and went into hiding. She learned from her husband that the PSB went to her home to arrest her for being a Falun Gong practitioner. Fearing she would be arrested and jailed, the Appellant used the services of a smuggler to leave China and travel to Canada.

[4] The Appellant's application for refugee protection was heard on July 26, 2013. In a decision of October 24, 2013, the RPD rejected the claim, finding that the Appellant is neither a Convention refugee nor a person in need of protection. The RPD found the Appellant not to be a credible witness. The RPD found that these credibility findings taken cumulatively led the panel to find the Appellant was not a Falun Gong practitioner.

[5] The Appellant submits the following:

- The RPD erred in law in ignoring and/or misinterpreting the evidence before it when it determined that the Appellant was not a Falun Gong practitioner and did not have a credible basis for her claim.
- The RPD erred in law in ignoring and/or misinterpreting the evidence before it when it determined that the Appellant did not have a well-founded fear of persecution **if** she was a Falun Gong practitioner.
- The RPD erred in refusing to consider country condition evidence relevant to the general human rights situation in China.
- The RPD erred in law in applying section 69 [*sic*] and section 97 of the Immigration Act and in its finding that the Appellant had no credible basis for her claim.¹

ANALYSIS

[6] Although the Appellant raises four issues, the RAD focused on the first issue, specifically, the identity of the Appellant as a practitioner of Falun Gong in assessing this appeal. In the RAD's view, all of the remaining issues will either fail or prevail based on the analysis of the reasonableness of this finding.

STANDARD OF REVIEW

[7] Although IRPA sets out grounds for appeal as well as possible remedies, it does not specify the standard of review to be applied by the RAD. The Appellant makes no submissions on the standard of review; however, she argues that the RPD's findings are unreasonable.

¹ Exhibit P-2, p. 35.

[8] In *Dunsmuir*,² the Supreme Court of Canada considered the foundations of judicial review and the applicable standards of review, concluding that there are two standards of review, correctness and reasonableness. In assessing and selecting the appropriate standard of review, the RAD considered the factors outlined in *Newton v. Criminal Trial Lawyers' Association*,³ which take into account the list of factors in *Dunsmuir*.⁴ The *Newton* factors are applied to determine the standard of review for any issue of fact, mixed fact and law, or law.

[9] The *Newton* factors deal with the standard of review to be applied by an appellate administrative tribunal to the decision of an administrative tribunal of first instance, and given the relationship between the RPD as a tribunal of the first instance and the RAD as an appellant administrative tribunal, the *Newton* factors are highly relevant.

[10] These factors are:

- a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
- b) the nature of the question in issue;
- c) the interpretation of the statute as a whole;
- d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
- e) the need to limit the number, length and cost of appeals;
- f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
- g) other factors that are relevant in the particular context.

² *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

³ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraph 44.

⁴ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

[11] In considering the factors in *Newton*, the RAD has considered which factors are most relevant. In assessing the relationship between the RAD and the RPD with respect to the *Newton* factors, the RAD considered the following three most significant factors:

- the respective roles of the RPD and the RAD in the context of IRPA;
- the expertise and advantageous position of the RPD member compared to that of the RAD; and
- the nature of the question in issue.

[12] Both the RPD and the RAD derive their jurisdiction from the same statute: IRPA. The *Act* gives each Division similar powers, although their roles are not the same. It is the primary role of the RPD as a tribunal of first instance to hear testimony, review evidence and determine a claim on its merits; while the RAD reviews those determinations based on questions of law, fact, or mixed fact and law. However, the fact that the RAD may, where appropriate, substitute a different determination than that made by the RPD does make its role similar to the RPD in that each Division is engaged in refugee determination.

[13] The RAD decides appeals of RPD decisions related to refugee protection on questions of law, of fact, or of mixed law and fact.⁵ The RPD is a tribunal of first instance which has been given the authority in IRPA to make a decision to accept or reject a claim for protection.⁶ RPD members have expertise in interpreting and applying IRPA and as well are experts in assessing claims based on country conditions. The RPD, in most cases, must conduct a hearing⁷ and assesses the totality of the evidence, including evidence related to the credibility of the Appellant and witnesses, after it has had an opportunity to see the claimants, hear their testimony and question them. The RPD has expertise in making findings of fact after evaluating, first hand, the testimony of witnesses.

⁵ IRPA, s. 110 (1).

⁶ IRPA, s. 107.

⁷ IRPA, s. 170.

[14] In contrast to the RPD's authority to assess a claim for protection, IRPA places some limitations on the RAD's ability to consider evidence. For instance, persons who are the subject of the appeal are limited in their ability to present evidence to the RAD. The RAD is not a tribunal of first instance but exists primarily to review the decision made by the RPD and, in the cases where new evidence is considered, to review those decisions in the context of that new evidence. The RAD must proceed without a hearing on the basis of the record, submissions by the parties, and new evidence.⁸ The RAD's authority to consider new evidence is also limited by the conditions set out in IRPA. Oral hearings are limited to circumstances where the new evidence raises a serious credibility issue.⁹

[15] It's the RAD's view that, given the limitations imposed on the role of the RAD by IRPA, the presence of a right of appeal in and of itself does not warrant a correctness standard on all issues. Rather, given that the RPD has held a hearing on the totality of the evidence, and given that the RPD has heard from the Appellant directly at a hearing, and given that the RAD's authority to consider new evidence is limited in IRPA, the RPD will be, in most cases, in the best position to assess the credibility of the Appellant and to make findings on issues of fact, and mixed law and fact related to the claim. This position is consistent with *Newton*, at paragraph 82, where it indicates with respect to the appellate division that: "The Board is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer, and the conclusions reached by him".¹⁰

[16] *Dunsmuir* also states that most questions of law are to be interpreted on a standard of reasonableness, except for certain narrow categories, such as constitutional questions, true questions of jurisdiction, questions of law that are of central importance to the legal system and outside the specialized area of expertise of the tribunal, and questions about the jurisdictional lines between tribunals.

[17] However, unlike the situation in *Dunsmuir*, both the RAD and the RPD have similar expertise in the interpretation of the IRPA. Although the RAD and the RPD have similar expertise

⁸ IRPA, s. 110(3).

⁹ RAD Rule 57.

¹⁰ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, paragraph 82.

in interpreting the enabling legislation, the RAD is given the ability to set aside a determination of the RPD and substitute a determination that, in its opinion, should have been made. This is a remedy that a court does not have in exercising judicial review of an administrative tribunal and tends to support a standard of correctness for questions of law. Also, both the RPD and the RAD are considered to have specialized knowledge. Therefore, errors of law within the expertise or mandate of the tribunals as well as questions of law of more general interest to the legal system are to be reviewed for correctness. Furthermore, the RPD's advantage of holding hearings in all cases does not seem to provide a reason for the RAD to show deference on questions of law.

[18] Additionally, under s.171(c) of IPRA, Parliament has given the RAD authority to review decisions of the RPD. Section 171(c) provides that decisions of a three-member RAD panel have "the same precedential value as a decision of an appeal court has for a trial court" for "the Refugee Protection Division and for a panel of one member of the Refugee Appeal Division." Decisions of appeal courts are binding on questions of law. That is why this provision suggests a correctness standard. The provisions of IRPA suggest that the RAD is empowered to bring finality to the refugee protection process and, as such, is entitled to show less deference to the RPD in matters of errors of law.

[19] For these reasons, the standard of correctness will be applied to errors in law.

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.¹¹

[20] In the case at hand, with regard to the first issue, the Appellant alleges that the RPD erred in law in by ignoring and/or misinterpreting the evidence before it when it determined that the Appellant was not a Falun Gong practitioner and was not a credible witness. However, the RAD finds that the RPD's findings in this regard on the basis of adverse credibility findings which are findings of fact. For these reasons, the RAD concludes that, in considering this appeal, it must show deference to the credibility findings of the RPD. The appropriate standard of review

¹¹ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para 50.

in this appeal is one of reasonableness. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the RPD's decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.¹²

ADMISSIBILITY OF NEW EVIDENCE PRESENTED ON APPEAL

[21] As provided for in s. 110(3) of IRPA, with certain exceptions, the RAD must proceed without a hearing, on the basis of the record of the proceedings of the RPD and may accept documentary evidence and written submissions from the Minister and refugee claimant. Subsection 110(4) of IRPA provides that the person may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[22] The Appellant submitted a letter of support from a Falun Gong practitioner¹³ as new evidence. The RAD considered the Appellant's new evidence. The RAD finds that this evidence does not conform to the requirements of 110(4) of IRPA as it is evidence that was reasonably available at the time of the RPD hearing, and the Appellant has not provided a persuasive argument why it was not available for the hearing.

[23] The RAD considered whether or not the Appellant could have reasonably been expected to present the documents at the time of the rejection given that the letter provided details of her practice of Falun Gong when she lived in China. The RAD notes that the Appellant has not provided any explanation why the Appellant could not have been reasonably expected to obtain and present this document at the time of the RPD hearing.

[24] If the Appellant believes these documents are important in establishing that the Appellant is a Falun Gong practitioner, the RAD finds that it would have been reasonable for the Appellant to present the documents at the time of the rejection. The Appellant was represented by experienced counsel at the hearing. The Appellant and her counsel had the opportunity to provide

¹² *Dunsmuir*, para. 47; in *Khosa*, para 4, the "range of reasonable outcomes."

¹³ Exhibit P-2, pp. 62 and 63.

any documentary evidence or evidence related to her claim at the time of the hearing. They did not provide any additional documents.

[25] For the reasons outlined above, the RAD finds that it is not persuaded that it would not have been reasonable for the Appellant to have provided this document at the time of the hearing and before the negative determination. As such, the RAD finds that the new evidence does not fall within the provisions of Section 110(4) of IRPA, and the RAD does accept them as new evidence.

THE RPD'S FINDINGS

[26] The Appellant argues that the RPD erred in ignoring and/or misinterpreting the evidence before it when it determined that the Appellant was not a Falun Gong practitioner and was not a credible witness. The Appellant does acknowledge, however, that the RPD's finding in this regard is based on its adverse credibility findings.

The Raid and PSB Pursuit

[27] The Appellant alleged that, when her Falun Gong group practice was raided by the PSB, she was able to escape the pursuing PSB by running for over 15 minutes. The RPD found it implausible that the Appellant would have been physically capable of escaping the pursuing PSB by running for that length of time given her XXXX problem.

[28] The Appellant argues that the RPD erred when it failed to presume that her testimony was truthful, and it had no reason to doubt it. The RAD is not persuaded by the Appellant's argument in this regard. The RPD found that the Appellant's testimony and her explanation were not plausible. The RPD is open to make reasonable findings based upon implausibilities, common sense and rationality, and it may reject evidence if it is not consistent with the probabilities affecting the case as a whole, even if that evidence is uncontradicted.¹⁴

[29] The Appellant further seems to argue that the RPD's finding was based on a microscopic analysis of peripheral facts. The RAD disagrees. The Appellant's pursuit by the PSB

¹⁴ *Giron, Luis Fernando Soto v. M.E.I.* (1992), 143 N.R. 238 (F.C.A.) 152;
Alizadeh, Satar v. M.E.I. (F.C.A., no. A-26-90), Stone, Desjardins, Décary, January 11, 1993.

is central to her claim. The RAD finds that it was open to the RPD to assess the credibility of her allegations of a raid and her escape from the PSB.

[30] The Appellant also argues that the RPD failed to allow the Appellant the opportunity to explain the supernatural aspects of Falun Gong. The Appellant argues that the RPD should have afforded her the opportunity to explain differences between ordinary people and practitioners of Falun Gong in the cultivation and acquiring of Gong. The Appellant goes on to argue that Falun Gong is supernatural and cannot be compared to the science of normal human practice. The RAD is not persuaded by the Appellant's argument in this regard. The Appellant was given the opportunity to explain how she was able to escape the PSB given her physical limitations. The Appellant merely stated that she experienced improvement in her XXXX due to her practice of Falun Gong. The Appellant had the opportunity to provide an additional explanation of the supernatural elements of the practice at her hearing but failed to do so.

[31] Notwithstanding the Appellant's explanation that she experienced some improvement in her physical condition through the practice of Falun Gong, the RAD nonetheless finds that the RPD's adverse credibility finding about the Appellant's escape from the raid to be reasonable.

Appellant's Exit from China

[32] The Appellant argues that the RPD misapprehended the evidence when it found it implausible that the Appellant could leave the country using her own passport. The Appellant refers to *Zhang*¹⁵ to support her argument. In that case, the reviewing court took exception to the RPD's findings when it concluded that possibly hundreds of officials had to be bribed to facilitate undetected departure from China.

[33] The Appellant argues that the Appellant used the services of a smuggler to leave China and that it is reasonable to assume that the smuggler used by the Appellant had the means of avoiding detection by airport officials.

¹⁵ *Zhang, Xiu Jie v. M.C.I.* (F.C., no. IMM-2703-07), Dawson, April 23, 2008; 2008 FC 533.

[34] The RAD is not persuaded by the Appellant's argument that these cases are similar. The RAD notes that, in the *Zhang* matter, the RPD engaged in the speculation that hundreds of officials would have to be bribed. Such was not the case in this matter.

[35] 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. Country documents¹⁶ state that the PSB have established a national policing database, which includes "criminal fugitive information" and "information on passports and exit and entry." In 17 June 2009, correspondence with the Research Directorate, a counsellor at the Embassy of the People's Republic of China in Ottawa provided the following information on Public Security Bureau (PSB) information sharing:

1. The national computer network of policing is called the Golden Shield Project.
2. The Project has eight databases:
 - (1). Population information, mainly the information on the citizen ID;
 - (2). Criminal record information;
 - (3). Criminal fugitive information;
 - (4). Information on stolen and robbed cars;
 - (5). Information on passports and exit and entry;
 - (6). Information on registered cars and drivers;
 - (7). Information on police officers;
 - (8). Information on key fire-prevention units.
3. Now all police departments at county level and above (namely police departments at provincial, city and county levels) and most police stations and other grass-roots units (namely police under the county level) can connect to the system. Some small police stations and grass-roots units in remote areas can not connect to the system.
4. Chinese police are in charge of exit and entry administration. Just like CBSA [Canada Border Services Agency], in all ports of entry including international

¹⁶ RPD's record, Exhibit R/A-1, NDP for China (3 May 2013), item 10.3, RIR CHN103133.E, 2 July 2009.

airports there are police units in charge of examination and they can connect to the system.

... A researcher... stated the following in correspondence with the Research Directorate: 'China's Public Security Departments absolutely do have nationwide computer information sharing networks, and have been working hard to develop and expand those for at least a decade'... It also includes monitoring phone conversations with advanced speech recognition technology, and monitoring citizens' movement through a vast network of surveillance cameras, equipped with face recognition technology...

[36] The claimant has alleged that she was identified as a practitioner of Falun Gong and that she was being pursued by the PSB in China. Given her allegation, it would appear unlikely that the claimant would have been able to leave China without being detected. The RAD notes that the Appellant has not provided any evidence to suggest that the smuggler had the ability to circumvent the extensive security at the airport which would allow her to exit China without being detected.

[37] Furthermore, in the *Zhang* matter, the reviewing court made reference to a 2001 Response to Information Report which addressed security and exit control procedures at Chinese airports. The documentary evidence before the RPD on issues of security and exit control is contained in Response to Information Request (RIR) CHN102869.E, dated July 2008. The RIR states in part:

In March 2008, the General Administration of Civil Aviation of China (CAAC), China's aviation regulator, reportedly introduced new security regulations (Airport International 17 Mar. 2008; Xinhua 27 Mar. 2008). The regulations instruct airport security to conduct a more thorough examination of hand luggage, to ban liquids on flights (ibid.; Airport International 17 Mar. 2008), and to have passengers remove their shoes for security checks (Xinhua 27 Mar. 2008). The regulations additionally prohibit "easy boarding" services, which had previously allowed passengers to obtain faster security checks and priority boarding (ibid.; Airport International 17 Mar. 2008). According to a 27 March 2008 article by the Chinese Xinhua News Service, the CAAC has also requested that all international airlines provide "accurate," "complete" and "timely" information on passengers and airline staff to the Chinese border authorities (Xinhua 27 Mar. 2008). The requested information reportedly includes name, nationality, gender, date of birth and passport number and expiration date (ibid.).

[38] Based on the foregoing, it is clear that security practices have become increasingly stringent in recent years in China and that there are systems now in place to identify persons leaving the country. The RPD's findings with regard to the Appellant's departure from China are

reasonable under the circumstances. The RPD is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole.¹⁷ Where the RPD finds a lack of credibility based on inferences concerning the plausibility of evidence, there must be a basis in the evidence to support such inferences.¹⁸ In this case, there is an evidential foundation for the RPD's findings. The RAD finds that the RPD's credibility finding on this issue was reasonable.

Uncontested Credibility Findings

[39] In addition to the two contested credibility findings noted above, the RPD also made a number of credibility findings which were not contested by the Appellant.

[40] **Appellant's Passport** - The RAD also notes that the RPD drew an adverse credibility finding in relation to the Appellant's testimony of the handling of her passport when she departed China. The RAD also notes that the Appellant does not contest this adverse credibility finding. The RPD noted that the Appellant provided contradictory evidence of how and when she handled her passport when at the Beijing airport. Although the Appellant offered an explanation for the contradiction in her testimony, the RPD found it lacking credibility. The RAD finds the RPD's finding on this uncontested credibility finding to be reasonable.

[41] **The Treatment of the Appellant's Family in China** - The RPD noted in its reasons that the Appellant did not adduce any evidence that her family in China has suffered any consequences as a result of her participation in Falun Gong and failure to surrender to the police. She testified that her husband continues to live in their home in China and that her children continue to attend school. Country documentary evidence¹⁹ regarding Falun Gong states that it is considered a cult by the Chinese government and is banned and indicates that Chinese authorities use the family of absconding practitioners as hostages to force the practitioner to give up the practice. If a practitioner does not cooperate with the authorities, the family is subject to punishment as well, including harassment, arbitrary interrogation, losing a job, and losing housing

¹⁷ *Numbi, Gaston Kipa v. M.C.I.* (F.C., no. IMM-92-12), Boivin, August 30, 2012; 2012 FC 1037, at 19.

¹⁸ *Miral, Stefnie Dinisha v. M.C.I.* (F.C.T.D., no. IMM-3392-97), Muldoon, February 12, 1999.

¹⁹ RPD's record, Exhibit RPD-1, National Documentation Package (3 May 2013), item 12.27, *Response to Information Request CHN102560.E*, 11 July 2007.

benefits. In the context of this case, the RPD drew an adverse credibility finding from the ability to carry on their lives in China without some form of consequence given that the Appellant alleged the PSB continued to pursue her at her home in China. The RAD finds that the RPD's finding in this regard was reasonable given the objective evidence.

[42] **The Appellant's Testimony Concerning the Falun Dafa Association** - The RPD found that the Appellant's testimony concerning her knowledge and involvement with the Falun Dafa Association was evasive causing the RPD to draw a negative inference. This credibility finding was not contested by the Appellant, and the RAD finds that the RPD's finding in this regard was reasonable.

CONCLUSION

[43] While it is true that the RPD could have articulated its reasons more fully, it is clear that the RPD found the entire allegations of the Appellant not credible and that it found that the Appellant was not being pursued by the PSB. However, the RAD finds that it is not clear the RPD dealt with the possibility that the Appellant may have a *sur place* claim despite the necessity of the RPD's reasons to deal with that issue.

[44] The RAD notes however, that the RPD's finding about the Appellant's identity as a Falun Gong practitioner was based on significant credibility issues including uncontested credibility findings. The RAD finds that the RPD's strong credibility findings apply not only to the Appellant's alleged practice of Falun Gong in China but also to Falun Gong activities in Canada.

[45] The RPD's findings, together with the record, are sufficient to establish that the Appellant has no *sur place* claim. In light of those findings and after an examination of the record, the RAD finds that the appellant would not face persecution or any other risk due to her activities in Canada.

[46] The RPD's finding that the Appellant is not a Falun Gong practitioner is reasonable. Therefore, the RAD finds that it need not address the remaining issues raised by the Appellant, as they depend on a finding that the Appellant is a practitioner of Falun Gong

[47] The RPD's finding that the Appellant is not a Convention refugee nor a person in need of protection is justifiable, intelligible, and transparent, and falls within the range of acceptable outcomes which are defensible in respect of the facts and the law.

DISPOSITION

[48] Pursuant to Section 111(1)(a) of IRPA, the RAD confirms the decision of the RPD that the Appellant is neither a Convention refugee nor a person in need of protection. This appeal is dismissed.

(signed)

“L. Favreau”

L. Favreau

January 29, 2014

Date