Federal Court  Cour fédérale

Date: 20180718

Docket: IMM-5378-17

Citation: 2018 FC 755

Ottawa, Ontario, July 18, 2018

PRESENT: The Honourable Madam Justice Strickland

Docket: IMM-5378-17

BETWEEN:

MENGZI YUAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of a member of the Refugee Protection Division ("Member" or "RPD") of the Immigration and Refugee Board of Canada, dated November 1, 2017, finding that the Applicant is not a Convention refugee nor person in need of protection pursuant to ss 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). The RPD also found the application to be manifestly unfounded.

[2] For the reasons that follow, I have determined that this application for judicial review must be granted as the RPD's finding that the claim was manifestly unfounded was unreasonable.

Background

[3] The Applicant, Mengzi Yuan, is a citizen of China. She claims she began practicing Falun Gong in China, in September 2013. In November 2013, members of the Neighborhood Committee visited her home and told her parents there were rumours of her practice. Her parents found an agent to assist the Applicant in coming to Canada, which she alleges she did in December 2014, and she made a claim for protection on February 5, 2015.

Decision under review

[4] The RPD first addressed a procedural issue. Specifically, that the hearing of the Applicant's claim had been commenced on September 14, 2017 but was adjourned prior to completion due to a lack of time. Subsequently, counsel for the Applicant requested an audit of the interpretation provided at the hearing. The audit was conducted and the presiding Member concluded that the interpretation had not been up to standard. Accordingly, a *de novo* hearing was ordered. At the commencement of the *de novo* hearing on October 23, 2017, counsel for the Applicant argued that the Member should recuse himself as he had been tainted by hearing testimony at the original hearing. The application for recusal was dismissed and the Member stated that oral reasons provided at the hearing were not repeated in his written decision. He stated he had considered the written and oral submissions of Applicant's counsel but determined

that there was no evidence of an apprehension of bias, as seen objectively from a third person's point of view, nor was there any evidence that the Applicant would not receive a fair hearing (*Committee for Justice and Liberty et al v National Energy Board et al* [1978] 1 SCR 369 ("*Committee for Justice*")).

[5] As to the claim on its merits, the RPD found that the determinative issue was credibility. It drew a number of negative credibility inferences, including the Applicant's inability to remember the name of the school she claimed to have been attending to study English since April 2015. The RPD also took issue with the Applicant's lack of proof of her journey to Canada. She was unable to provide travel documents such as a passport, itinerary, ticket, or boarding pass and claimed all of these documents had been given to the smuggler. The RPD drew a negative inference from the lack of documents because this type of evidence confirms an immediate escape from a place of persecution. Without travel documents there was no way of determining with certainty if the Applicant immediately fled, or if she spent time in a third country where she was not persecuted, which also spoke to her subjective fear.

[6] The RPD also made negative credibility findings based on the Applicant's inconsistent testimony in relation to her knowledge of the fraudulent documents used to obtain a Canadian visa. The Applicant claimed that it was not until she arrived in Canada that she realized her application included the names of two people who were not her parents. However, the RPD rejected this, noting that prior to her application to enter Canada, the Applicant's parents, with whom she resided, had used the same smuggler to assist the Applicant in applying for an American visa. Her evidence, with respect to the three unsuccessful attempts to obtain a visa in

the United States, was that she understood that those applications were based on fraudulent information. The RPD found that the Applicant applied for a Canadian visa, using fraudulent documents, at a time when she was not wanted by the Public Security Bureau ("PSB") in China. She had no justifiable reason for using fraud in those circumstances.

[7] The RPD took issue with the Applicant's testimony concerning her Falun Gong activity in China. The Applicant testified that she was introduced to the practice by a friend. When asked why she had her parents write a letter in support of her genuine practice, but not the friend who had first-hand knowledge of this, the Applicant replied that because Falun Gong is prohibited in China she feared causing her friend trouble and, therefore, she had not tried to contact her to provide a letter. The RPD found that there was no evidence that the Applicant's friend was at risk and that it made no sense that the Applicant could get a letter from her parents, but not her friend. The RPD drew a negative credibility inference based on the Applicant's failure to obtain documentary proof of her claim.

[8] The letter from the Applicant's parents stated that they did not know she was practicing Falun Gong until November 2013, when the Neighbourhood Committee approached them, after which the Applicant admitted to her parents that she was a practitioner. The RPD found that the Applicant's parent's knowledge of her practice was based only on what she had told them and they had not given details of what the Neighbourhood Committee had said to them. The RPD found that the letter did not advance the Applicant's claim of being a genuine Falun Gong practitioner in China and, other than her testimony, there was no evidence of her practice there. In the result, the RPD found that she was not a genuine Falun Gong practitioner in China.

[9] As to the Applicant's *sur place* claim, the RPD considered two supporting letters from two other practitioners in Canada who met the Applicant through Falun Gong. The RPD found that the first letter was dated March 20, 2015 and was of little assistance because it did not address the Applicant's practice of Falun Gong after that date. The second letter was dated September 9, 2017, it had few details, did not cover the period from March 2015 to February 11, 2016, when the writer first met the Applicant, and the writer did not appear to give evidence at the hearing. The RPD found that the letter did not provide a basis for saying the Applicant is a genuine Falun Gong practitioner nor did it explain why the writer could assess the Applicant as such. The RPD afforded the letter no weight. The RPD also considered various photographs submitted by the Applicant but concluded that the evidence did not establish that the Applicant had been involved in the practice of Falun Gong on a sustained basis while in Canada over the last three years. The RPD held she was not a genuine Falun Gong practitioner either in Canada or in China. Further, that there was no evidence that her activities in Canada would have come to the attention of the authorities in China. As a result, her *sur place* claim failed.

[10] Because there was evidence of fraud in applying to Canada for a visa with fraudulent documents, at a time when the Applicant did not face a serious possibility of persecution, the RPD also found that the claim was a manifestly unfounded claim pursuant to s. 107.1 of the IRPA.

Issues and standard of review

[11] The Applicant submits that the issues are:

i) Did the RPD member breach the duty of procedural fairness and natural justice in refusing to recuse himself; and

ii) Did the RPD err in law in finding that the claim was manifestly unfounded?

[12] The correctness standard applies to issues of procedural fairness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at paragraphs 34-35) ("*Canadian Pacific*") which have been found to include bias (*Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242 at para 17 ("*Nweke")*; *Butterfield v Canada (Attorney General)*, 2016 FC 777 at para 5; *Khader v Canada (Citizenship and Immigration)*, 2013 FC 315 at para 28). However, as noted by the Respondent, the Federal Court of Appeal has recently stated that certain procedural matters, such as bias, do not lend themselves to a standard of review analysis at all (*Canadian Pacific* at paras 33-56). In this matter, nothing turns on this point.

[13] The standard of review for credibility, as well as manifestly unfounded findings, is reasonableness (*Nanyongo v Canada (MCI)*, 2018 FC 105 at para 8 ("*Nanyongo*"*)*; *Nagornyak v Canada (Citizenship and Immigration)*, 2017 FC 215 at para 11 ("*Nagornyak"*), citing, *Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596 at para 25 ("*Warsame*")*; Nweke* at para 17).

Preliminary matter – supporting affidavit

[14] I also note, as a preliminary matter, that the Respondent points out in its written submissions that the Applicant provides no supporting affidavit. Rather, an affidavit of Laura

Barbosa, who describes herself only as someone who assists Applicant's counsel from time to time with clerical work, has been filed. The Respondent submits that this appears to be based mostly on hearsay that the affiant appears to have received from the Applicant's counsel, giving the impression counsel is testifying via proxy which is improper practice (*Williams v Canada (MCI)*, 2018 FC 100 at paragraph 56). Accordingly, that paragraphs 15-17, 22-24, 26, 27, and 31 should be struck or given no weight. This issue was not addressed at the hearing before me.

[15] Rule 81(1) of the *Federal Court Rules,* SOR/98-106 states that affidavits shall be confined to the facts within the deponent's personal knowledge. Rule 81(2) requires that where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of the material facts. Rule 82 states that, except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit. Moreover, s.12 of the *Federal Courts Citizenship Immigration and Refugee Protection Rules*, SOR/93-22, addresses affidavits filed in relation to leave applications, requiring that they be confined to such evidence as the deponent could give if testifying as a witness before the Court (see *Antakli v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 356 at para 10).

[16] Here, Ms. Barbosa does not indicate that she is an employee of counsel for the Applicant, she does not state that the facts to which she deposes are within her personal knowledge, nor that the affidavit is based on belief and the source or basis of that belief. I agree with the Respondent that Ms. Barbosa appears to be deposing to information provided to her by the Applicant's counsel pertaining to the events at the RPD hearings. That said, the impugned paragraphs, in

general, state information that is apparent from the record, such as that the RPD examined the Applicant on her Falun Gong identity at the September 14, 2017 hearing (para 15) and that Applicant's counsel did not start his examination of the Applicant at that hearing prior to its adjournment (para 16). Some paragraphs add a gloss to the proceedings described, such as that at the October 23, 2017 hearing the RPD "barely" asked the Applicant questions about her Falun Gong activities (para 26) and that in his written submissions, counsel for the Applicant "strongly expressed his dissatisfaction" about the RPD's refusal to recuse. To the extent that the paragraphs add such a gloss, or speak to matters not apparent from the record, I afford them no weight.

Issue 1: Did the RPD member breach the duty of procedural fairness and natural justice in refusing to recuse himself?

[17] The Applicant submits that the Member heard substantial testimony at the September 14, 2017 hearing which was tainted by the problematic interpretation. The Member was capriciously dismissive of the request that he recuse himself from the *de novo* hearing, thereby breaching the Applicant's right to natural justice and procedural fairness. Further, that the Member's conduct at the *de novo* hearing was not consistent with the appearance of fairness. Specifically, at the second hearing the Member focused on peripheral issues instead of the central and determinative issue, the Applicant's Falun Gong identity, upon which she had been extensively examined at the first hearing. The Applicant submits that this violated the principle that justice must not just be done, it must be seen to be done (*Tunian v Canada (MCI)*, 2002 FCT 1209 at para 14). Further, that the Member's finding that the claim was manifestly unfounded supports the appearance of unfairness.

[18] The Respondent submits the legal test for a reasonable apprehension of bias is set out in *Wewaykum Indian Band v Canada,* 2003 SCC 45, [2003] 2 SCR 259 at para 60 ("*Wewaykum"*). The threshold is high and the apprehension of bias must be a reasonable one, held by a reasonable and right minded person, applying themselves to the question. The Applicant fails to meet this test.

[19] In *R v S (RD),* [1997] 3 SCR 484 at para 31 ("*SRD*"), the Supreme Court of Canada stated that the test for a reasonable apprehension of bias is that set out by Justice de Grandpré, in dissenting reasons, in *Committee for Justice and Liberty v Canada (National Energy Board) (1976),* [1978] 1 SCR 369 at pp 394-395 ("*Committee for Justice*"). There, Justice de Grandpré stated that the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. The test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly". Further, that the grounds for a reasonable apprehension of bias must be substantial, and the test is not applied utilizing the "very sensitive or scrupulous conscience" (*Committee for Justice* at p 394; *SRD* at para 31).

[20] In *Wewaykum,* the Supreme Court of Canada confirmed that this is the test to be applied when considering whether a judge should have recused him or herself based on an allegation of a reasonable apprehension of bias. The standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality, and is an inquiry that

is highly fact specific (see paras 60, 66, 76, 77). The party asserting bias must meet a high threshold and the presumption can only be rebutted by serious and substantial demonstrations made by convincing evidence (see *SRD* at paras 113-114, 117; *Blank v Canada (Justice)*, 2017 FCA 234 at para 3; *Badawy v Waldemar*, 2016 FCA 162 at para 6; *Es-Sayyid v Canada (Public Safety and Emergency Preparedness)* 2012 FCA 59 at paras 35 and 39; *Zhu v Canada (Citizenship and Immigration)*, 2013 FC 1139 at paras 1-2).

[21] The Applicant's bare submission that a breach of procedural fairness arises because of the alleged "dismissive treatment" of her counsel's arguments on the recusal motion before the Member cannot succeed, without more. The real issue is whether there was a reasonable apprehension of bias in the Member hearing the *de novo* review. In that regard, the Applicant submits, again by way of only a bare allegation, that because the Applicant's testimony was prejudiced by incompetent interpretation at the first hearing, the Member should have recused himself at the *de novo* hearing. The Applicant submits that the transcript indicates, when appearing before the Member, that her counsel submitted that the *de novo* hearing should be heard by a member not tainted by the hearing of bad interpretation mixed with testimony and that the Member, who had heard the case at the first hearing, may have formed some opinions as he had completed his examination at the time of the adjournment.

[22] Having reviewed the transcripts of both hearings, I note that at the first hearing the Member asked the Applicant questions about her knowledge of Falun Gong in relation to the five exercises and related verses and also asked the Applicant to demonstrate. Following the completion of questioning by the Member, the Applicant advised her counsel that she normally

did her exercises with music and felt strange and off performing them without it. Counsel asked the Member if the Applicant could bring music with her when the hearing resumed and again perform the exercises. The Member refused the request, noting that it is well known that claimants will be asked questions about the exercises and that he would not permit a redo.

[23] At the second hearing, the Member did not ask these same questions. At one point during the hearing, counsel intervened stating his concern that new questions were being posed by the Member which had not been asked at the first hearing, to which the Member reminded counsel that this was a *de novo* hearing. Counsel's response was that the Member was not focusing on what counsel deemed to be the main issue, the Applicant's Falun Gong identity. The Member stated that he would ask the questions that he wanted to ask and then counsel would have an opportunity to ask his own questions. During counsel's questions he asked the Applicant to recite the exercises, their purposes and related verses and to perform an exercise.

[24] When asked by her counsel if there was anything she would like to say to the Member, she stated that at the first hearing she had performed poorly and she hoped it would not affect or influence the Member's decision in the second hearing. Her counsel then stated that this was his whole point and that is why he had asked the Member to recuse himself, because in the Applicant's mind, the hearings were connected. The Member advised the Applicant that she could rest assured that nothing that was said or done in the last hearing would impact his decision; the evidence from the first hearing was not before him and had no bearing on the *de novo* hearing. He stated that after the last hearing he had ordered an audit and concluded that the

translation was not fair to the Applicant and did not accurately reflect what she said, that was why they had started afresh.

[25] I note that the Certificate of Interpretation Analysis, the audit, is detailed and, amongst other things, points out that the interpreter had problems with Falun Gong terminology, could not interpret a very common mainland Chinese term "neighbourhood committee", and the translator's delivery was confusing because the interpreter would sometimes ask his own questions and provide his own explanations or comments while delivering his interpretation. The fact that the Member agreed to the request of an audit and, based on its findings, accepted that the Applicant's testimony in the first hearing was not accurately translated and ordered a *de novo* hearing, in effect, cured the inaccuracies. Applicant's counsel submitted that the Member could not "unhear" the testimony given at the first hearing, this is true, but he could disregard it and base his decision only on the record before him at the *de novo* hearing, which is what the Member did. Significantly, in my view, the Applicant provides no examples of how the testimony given at the first hearing was rendered prejudicial by the poor translation, rather than simply inaccurate.

[26] The crux of the submission made by the Applicant's counsel was that the Member focused on peripheral issues, instead of the central and determinative issue of the Applicant's Falun Gong identity. Counsel submits that at the first hearing the Applicant was extensively questioned in this regard while at the *de novo* hearing the Member hardly questioned her at all on this issue. When asked to explain how this demonstrated a reasonable apprehension of bias, counsel submitted that the conduct of the Member, in asking these questions in the first hearing

but not at the *de novo* hearing, demonstrated bias. Further, given that the Applicant's testimony at the first hearing was tainted by interpretation problems it made sense that the Member would ask the same questions at the *de novo* hearing, yet he inexplicably failed to do so. And, although counsel himself put these questions to the Applicant at the *de novo* hearing, the Member did not assess this testimony in his decision. Moreover, the Member's focus on peripheral matters and overzealous approach to the evidence established that the Member had already formed his opinion and was seeking to undermine the Applicant's case.

[27] It may be that by these submissions counsel for the Applicant is not merely suggesting that there was a reasonable apprehension of bias, but that the Member's conduct establishes actual bias. However, as the Applicant framed her submissions in the context of fairness appearing to have been done, I will address the issue on that basis. As stated by the Supreme Court of Canada in *Wewaykum*, in the context of a discussion of the circumstances in which the parties have acknowledged that there was no actual bias:

> 66 Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was <u>in fact</u> either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, *supra*, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice".
>
> [Emphasis in original]

[28] It is clear from the transcript of the *de novo* hearing that the Applicant herself was concerned that her poor performance in the first hearing would impact the decision to be rendered after the *de novo* hearing. However, the test for a reasonable apprehension of bias is not to be utilized by the "very sensitive conscience". Understandably, the Applicant would fall into that category in these circumstances, thus the test is not met simply on the basis of her concern.

[29] Moreover, it was open to the Member to choose what questions he wished to put to the Applicant. As he pointed out, it was a *de novo* hearing, accordingly, he was not compelled to try to recreate the first hearing. Further, there is jurisprudence that suggests that religious knowledge cannot be equated with faith and that the quality and quantity of religious knowledge to prove faith is unverifiable (*Zhang v Canada (Citizenship and Immigration)*, 2012 FC 503 at para 16). Put otherwise, religious knowledge cannot necessarily be equated to the genuineness of a claimant's beliefs. While a certain level of knowledge may be expected, the sincerity of the belief is what is legally relevant (*Ren v Canada (Citizenship and Immigration)*, 2015 FC 1402 at para 18; *Liang v Canada (Citizenship and Immigration)*, 2017 FC 1020 at para 18. Accordingly, the Member was not compelled to test this or to test it in the manner that the Applicant's counsel would prefer.

[30] That said, I acknowledge that there could be a perception that by not asking the Applicant the same questions as to her Falun Gong knowledge the Member was, in effect, precluding the Applicant the opportunity of the "redo" that she had sought and been denied at the close of the Member's questions in the first hearing. I would also point out, however, that when the Member did attempt to ask a different question about her religious knowledge - which of the five

exercises is focused on getting rid of karma and jealousy - counsel objected to the question on the basis that it was misleading because there was no one exercise that does this and stated that, in his view, this was a trick question. The Applicant then duly answered that it was necessary to practice all five exercises to achieve this.

[31] With respect to the Applicant's submission that the Member focused on peripheral matters rather than the Applicant's "Falun Gong identity" (*Rasheed v Canada (Minister of Citizenship and Immigration)* 2004 FC 587 ("*Rasheed*"), I note that the Member made a number of negative credibly findings. In my view, even if one or all of them were unreasonable, this is demonstrative of reviewable error, not bias. Further, in *Kozak v Canada (MCI),* 2006 FCA 124, the Federal Court of Appeal stated that the legal notion of bias also connotes circumstances that give rise to a belief by a reasonable and informed observer that the decision-maker has been influenced by some extraneous or improper consideration (at para 57). Based on the record and the decision, I am not persuaded that in this matter the Member based his decision on improper considerations. Rather, the Applicant would prefer that the Member had focused on other evidence.

[32] In conclusion, viewing the matter in whole, I am not persuaded that the Applicant has established that an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the Member, whether consciously or unconsciously, would or did not decide fairly and therefore that he erred by failing to recuse himself.

Issue 2: Did the RPD err in law in finding that the claim was manifestly unfounded?

[33] The Applicant submits that the RPD's finding that her claim was manifestly unfounded was unreasonable as it fails to meet the legal test for manifestly unfounded claims, which Parliament equated with clearly fraudulent claims. A mere finding of negative credibility is not enough to give rise to a claim being manifestly unfounded. It is the claim itself that must be fraudulent (*Nagornyak* at paras 14 -15). The Applicant submits that the RPD's reasons fail to support the finding that her claim is clearly fraudulent.

[34] The Applicant also submits that the RPD engaged in an overzealous attack on her testimony and supporting documentation and improperly focused its assessment on peripheral matters. In that regard, whether her testimony in relation to her travel to Canada was truthful or not, this was not a valid basis for a negative credibility finding on her Falun Gong identity. Her journey to Canada was a peripheral matter and the RPD erred in law by ignoring *Rasheed* at para 18. The lack of a passport was also not relevant to her Falun Gong identity. Further, the RPD ignored the presumption of truthfulness that should be afforded an applicant's testimony. It unreasonably required corroborating evidence from the Applicant's friend in China and rejected the Applicant's plausible explanation for not seeking such a letter. The RPD was also overzealous and unfairly dismissive of the letter from the Applicant's parents as well as the photos and letters submitted in support of her *sur place* claim, and ignored her testimony as to her Falun Gong activities in Canada and her demonstrated knowledge of Falun Gong principles and practices.

[35] For its part, the Respondent submits that the credibility findings of the RPD were reasonable. The RPD made negative credibility findings undermining all aspects of the

Applicant's claim including that: she failed to provide proof of her Falun Gong activities in China; she failed to establish the reason she sought a visa to Canada and gave non-credible evidence as to her activities in Canada; her failure to adduce proof of her journey to Canada; the genuineness of her Falun Gong belief; the use of fraud to obtain a Canadian visa at a time when fraud was not necessary, and, there was no evidence that her activities in Canada would or had come to the attention of Chinese authorities. The Respondent points out that the Applicant employed fraud in obtaining her Canadian visa at a time when she did not face a serious possibility of persecution. This fraud is directly relevant to the circumstances to why and how she left China, as well as whether or not she was being sought by the Chinese authorities. Because she had no justifiable reason for using fraud to get a Canadian visa this reasonably led the RPD to conclude that her claim was manifestly unfounded (*Warsame* at para 30; *Nanyongo* at para 18).

[36] Section 107.1 of the IRPA concerns manifestly unfounded claims:

> **107.1** If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent.

[37] The consequence of a finding by the RPD that a claim is manifestly unfounded is very significant to the applicant, as it precludes the right of an appeal to the Refugee Appeal Division ("RAD"):

> **110 (1)** Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.

……

(2) No appeal may be made in respect of any of the following:

……

(c) a decision of the Refugee Protection Division rejecting a claim for refugee protection that states that the claim has no credible basis or is manifestly unfounded;

……..

[38] There is not a great deal of jurisprudence concerning s 107.1. In *Warsame*, Justice Roy stated that:

> [26] The issue of the identity of the claimant is in this case subsumed, for all intents and purposes, in the decision made by the RPD to find that the claim for refugee protection is clearly fraudulent. The RPD found that section 106 of IRPA had not been satisfied on its way to concluding that the claim was manifestly unfounded. To put it another way, the claim is clearly fraudulent because the RPD came to the conclusion that false allegations, including the identity of the applicant, have been made about issues that go to the very heart of the claim for refugee protection, including of course the identity of the claimant.
>
> [27] Parliament chose to require that the claim be "clearly fraudulent" for particular consequences to flow. That would entail that it is the claim itself that is assessed as being fraudulent, and not the fact that the applicant would have used, for instance, fraudulent documents to get out of the country of origin or to gain access to Canada. However, once making a claim for refugee protection, the applicant would have to operate with clean hands and statements in support of the claim have to be accurate or they could be held against the claimant. In other words, the claimant would be attempting to gain refugee protection through falsehoods that may make the claim fraudulent. It is the claim that must be fraudulent.

….

> [30] For a claim to be fraudulent, it would be required that a situation be represented of being of a certain character when it is not. But not any misstatement or falsehood would make a refugee

> claim fraudulent. It must be that the dishonest representations, the deceit, the falsehood, go to an important part of the refugee claim for the claim to be fraudulent, such that the determination of the claim would be influenced in a material way. It seems to me that a claim cannot be fraudulent if the dishonesty is not material concerning the determination of the claim.
>
> [31] If the word "fraudulent" signals the need for a misrepresentation of the truth or a concealment of a material fact for the purpose of getting another party to act to its detriment, I would have thought that the word "clearly" would go to how firm the finding is. For instance, Black's Law Dictionary (West Group, 7th Ed) defines "clearly erroneous standard" as "a judgment is reversible if the appellate court is left with the firm conviction that an error has been committed." Similarly, clearly fraudulent would in my view signal the requirement that the decision maker has the firm conviction that refugee protection is sought through fraudulent means, such as falsehoods or dishonest conduct that go to the determination of whether or not refugee protection will be granted. Falsehoods that are merely marginal or are antecedent to the refugee claim would not qualify.

[39] In *Warsame* the RPD found that the applicant had not established his identity and that his birth and marriage certificates were fraudulent. Justice Roy found that it was open to the RPD to find that the applicant's narrative seeking protection was deficient to the point of being fraudulent. Justice Roy stated that the claim was clearly fraudulent because the RPD came to the conclusion that false allegations, including the identity of the applicant, were made about issues that went to the very heart of the claim for refugee protection.

[40] In *Nanyongo* Justice Fothergill concluded that the RPD's many adverse credibility findings, only some of which were challenged in the application for judicial review before him, provided sufficient support for the determination that the claim was manifestly unfounded.

[41] In this matter, the Applicant's submissions on this issue are not, in my view, clearly directed at the issue of whether the finding that the claim was manifestly unfounded was reasonable. I agree with the Applicant that the Applicant's personal identity was not at issue, even though she came to Canada on false documents. It is also true that the use or destruction of false travel documents on an agent's instruction has been held to be peripheral and of very limited value as a determination of general credibility. This is because those fleeing persecution often do not have regular travel documents and follow the instructions of the agent because of fear and vulnerability. Further, because truthfulness about travel documents has little direct bearing on whether a person is a refugee (*Rasheed*). However, as pointed out by the RPD in its reasons, there is also case law indicating that in some circumstances the RPD is warranted in drawing a negative inference if the claimant does not present travel documents which would assist it in confirming the claimant's travel itinerary.

[42] In this matter, the RPD found that the travel documents were "crucial" and rejected the Applicant's explanation "for the reasons given". However, it is not clear to me from the RPD's prior discussion what its reasons were for not accepting her explanation that the smuggler she used to provide the documents told her to destroy them. Rather, the RPD seemed focused on the importance and purpose of the documentation and appears to have based its decision on that, as opposed to explaining why her explanation was not accepted. That said, this is not a situation where, because of her circumstances the Applicant was unable to access her travel documents. She did not flee in haste or have her home and belongings destroyed or stolen. Indeed, she had made three prior attempts, using fraudulent documents, to obtain a visa to enter the United States before successfully obtaining a student visa for Canada, again using fraudulent documents.

[43] It was also not unreasonable for the RPD to find that the Applicant had knowingly used fraudulent documents to apply for a student visa. However, the crux of its manifestly unfounded determination appears to be that, at the time these arrangements were made, the Applicant was not wanted by the PSB in China. As she was not fleeing persecution, she had no justifiable reason for using fraudulent means to obtain a visa. In this regard, the RPD stated that because there was evidence of fraud in applying to Canada for a visa with fraudulent documents, at a time when the Applicant did not face a serious possibility of persecution, it also found the claim to be manifestly unfounded.

[44] My concern here is that the use of fraudulent documents was the means by which the Applicant gained access to Canada. She acknowledged that they were fraudulent and her identity was not at issue. In this way, the fraud of obtaining a student visa was tangential to her claim of persecution, it was not central to it. And while little weight was afforded to her other supporting documentation, it was not found to be fraudulent. Nor did she fraudulently assert that she was being pursued by the PSB when she left China. Rather, her claim was that the Neighbourhood Committee had raised rumours of her Falun Gong practice with her parents. Thus, it was open the RPD to find, as it did, that this did not amount to a serious risk of persecution. However, to my mind, this differs from a finding that the claim itself was wholly fraudulent. And while *Warsame* and *Nanyongo* could be taken to suggest that it was open to the RPD to base its manifestly unfounded finding on its cumulative credibility findings, I confess that I have some concern that, at least in this case, these add up to the claim being clearly fraudulent, as opposed to having no credible basis. In any event, here the RPD did not base its manifestly unfounded finding on the basis of its cumulative negative credibility findings.

[45] As stated by Justice Heneghan in *Brindar v. Canada (Citizenship and Immigration)*, 2016 FC 1216 at para 11, a negative credibility finding is not synonymous with submission of a fraudulent claim. She held that in the matter before her, the RPD's reasons did not illustrate that it appreciated this distinction. Consequently, the RPD's reliance on s. 107.1 was unreasonable. I would also note that this Court has previously found that the threshold for finding that there is a no credible basis for the claim, pursuant to s. 107(2) of the IRPA, is a high one a (see *Levario v. Canada (Citizenship and Immigration)*, 2012 FC 314 at para 18-19; *Boztas v. Canada (Citizenship and Immigration)*; 2016 FC 139 at para 11). In my view, a similarly high threshold should apply to a s.107.1 finding that a claim is manifestly unfounded.

[46] In this matter, the RPD reasons devoted only one sentence to its finding that the claim was manifestly unfounded. As in *Brindar*, I am not satisfied that this demonstrated that the RPD appreciated the difference between a clearly fraudulent claim and one that is based on negative credibility findings, or otherwise adequately explained the basis for its conclusion. Accordingly, its finding is not justified, transparent and intelligible, and does not meet the reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47). While the final result may ultimately well be the same, I am remitting the matter back for redetermination on the basis that manifestly unfounded finding was unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5378-17
STYLE OF CAUSE:	MENGZI YUAN v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 26, 2018
REASONS FOR JUDGMENT AND JUDGMENT:	STRICKLAND J.
DATED:	JULY 18, 2018

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