Federal Court  Cour fédérale

Date: 20200427

Docket: IMM-543-19

Citation: 2020 FC 542

Ottawa, Ontario, April 27, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CHENCHEN MAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a January 4, 2019 decision of the Refugee Appeal Division [RAD], wherein it confirmed (for the second time) a decision of the Refugee Protection Division [RPD] that determined that the Applicant was not a refugee under either sections 96 or 97(1) of the IRPA.

[2] The application for judicial review is dismissed for the reasons that follow.

II. Background

[3] The Applicant, Chenchen Mao, is a citizen of China. His story is as follows: In February 2015, while living in China, he began practicing Falun Gong because he suffered from depression and insomnia. He joined an underground Falun Gong practice group two weeks later. In September 2015, the Public Security Bureau [PSB] raided his Falun Gong practice group. The Applicant was one of the lookouts for the group on that day and fled to his aunt's home. The PSB looked for him at his home and left a Chinese subpoena/summons [Chuanpiao] at his home that accused him of involvement in illegal Falun Gong activities and recruiting members for an illegal organization.

[4] The Applicant decided to flee China in November 2015 after hearing that two members of his group had been arrested. He also learned that the PSB had repeatedly looked for him at his house. With the help of a smuggler, the Applicant first arrived in the United States [US] and then arrived in Canada on November 10, 2015, where he made a refugee protection claim. He claims that the PSB is aware that he is a Falun Gong practitioner and that, if he were to return to China, the PSB would imprison and persecute him.

[5] The Applicant has since appeared before the RPD, the RAD, and this Court attempting to confirm his refugee status. In June of 2016, the RPD rejected his refugee claim; the RPD took issue with the Applicant's identity and had concerns about his credibility due to some inconsistencies between his materials; the Applicant then appealed the matter to the RAD, who

dismissed the appeal in September 2016. The Applicant applied for judicial review of the RAD decision. However, in February 2017 the parties agreed to have the matter re-determined by a different panel of the RAD.

[6] The new panel of the RAD took issue with some of the RPD's findings relating to the Chuanpiao, but in September 2017 it affirmed the RPD's conclusions. In addition, the RAD found that the Applicant was not a genuine Falun Gong practitioner.

[7] The Applicant then applied for judicial review of the September 2017 RAD decision. In September 2018, this Court found that the RAD did not consider the totality of the evidence regarding the Applicant's Falun Gong practices either in China or in Canada. Accordingly, the RAD decision was set aside and remitted for redetermination before a different panel of the RAD.

[8] In January 2019, the RAD again denied the Applicant's refugee status. It is this decision that is now the subject of this judicial review.

[9] In its January 2019 decision, the RAD reviewed numerous aspects of the RPD's decision. The Applicant argued before the RAD that the RPD: engaged in an unreasonable analysis of the Appellant's entry to Canada; erred in its credibility analysis; erred by dismissing the Applicant's summons and outpatient record; erred in its analysis of the Basis of Claim omission; erred by conducting a microscopic examination of the raid; erred in its analysis of the Appellant's failure

to make a refugee claim in the US; and erred in its analysis of the Appellant's Falun Gong identity.

[10] The RAD again found that the RPD did not err in its conclusion, but it did err slightly in part of its reasoning. The RAD found that: (1) the RPD reasonably analysed inconsistencies in the Applicant's testimony about why he chose to enter Canada and did not claim asylum in the US; (2) the RPD did make an error by not independently assessing the Applicant's subpoena and medical booklet toward confirming his narrative that he was wanted by authorities and practiced Falun Gong; however, it was not fatal. The RAD independently assessed the evidence and found that the Applicant would not have been able to exit China if he was really "wanted" by China; (3) the RPD did not err in finding that the Applicant had not established, on a balance of probabilities, that he was a Falun Gong practitioner in Canada. The RAD conducted an independent assessment of the evidence and reached the same conclusion, considering his submitted evidence of photographs, testimonials, and group membership.

[11] The RAD found that the issues above were determinative of the claim; as such, it did not need to discuss the RPD's analysis of the Applicant's Basis of Claim submissions, US refugee claim, and the PSB raid on the Falun Gong group in China.

[12] The hearing of this matter was initially scheduled to be heard on September 5, 2019, however, at the hearing, counsel for the Applicant requested that the matter be adjourned in order that he could make supplemental submissions concerning the revocation of the Jurisprudential Guide. Counsel for the Respondent did not object, but requested the opportunity to make

supplemental submissions in response. I agreed, and the matter was subsequently held by videoconference on December 19, 2019. Subsequent to the hearing, the Supreme Court rendered its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] concerning the standard of review of administrative decisions. Both parties also made additional submissions on the standard of review in light of *Vavilov*.

III. Issues and Standard of Review

[13] The Applicant presents many issues claiming that the RAD's decision was procedurally unfair and parts of its decision were unreasonable. I condense these issues to the following:

A. *Did the RAD breach procedural fairness?*

B. *Was the RAD's decision unreasonable?*

[14] I note that the Applicant previously claimed that the RAD erred in law by interpreting IRPA to mean that they are unable to hold an oral hearing without new evidence. The Applicant abandoned these arguments at the hearing and I will not factor these arguments into the analysis and reasons.

IV. Standard of Review

[15] As briefly discussed above, the Supreme Court clarified the legal issues around the standard of review through its decision in *Vavilov*. This has altered the standard of review analysis. Courts now start with the presumption that reasonableness is the default standard of

review, except in cases of procedural fairness; but it can be rebutted in certain cases (*Vavilov* at paras 23, 33). Notably, this extends to certain questions of law that are not "general questions of law of central importance to the legal system as a whole…" (*Vavilov* at paras 59-61).

[16] Therefore, I will assess the Applicant's issues on a reasonableness standard with the exception of the procedural fairness issue, which I will assess on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

[17] I note that, while the correctness standard remains unchanged, the Supreme Court in *Vavilov* has provided additional direction on how Courts are to conduct a reasonableness review. Courts are to evaluate the decision and assess whether it is based upon a logical and clear chain of reasoning—the decision must be, not only *justifiable* but *justified* (*Vavilov* at para 86). The Supreme Court provides two convenient categories where a decision may be unreasonable: it is internally incoherent or it is untenable when inspecting the facts and law before it but it acknowledges that these are merely examples (*Vavilov* at para 101).

V. Parties' Positions

A. *Did the RAD breach procedural fairness?*

[18] The Applicant claims that the RAD did not give him an opportunity to respond to issues not raised by the RPD namely, the Chuanpiao, the Golden Shield, and his fraudulent Falun Gong practices. He also takes issue with the RAD consulting certain guidance documents without

notice. The Applicant submits that the RPD and RAD's procedural fairness obligations fall at the high end of the procedural fairness spectrum.

[19] The Respondent opposes these claims, noting that it was the Applicant who raised some of these issues in the first place as part of his claim. Concerning the Golden Shield, the Respondent submits that this issue was before the RPD and therefore could be considered by the RAD. It notes that this Court has previously rejected these arguments. It further notes that the RAD is entitled to do independent analyses where required, and that no notice is required for relying on jurisprudential guides.

B. *Was the RAD's decision unreasonable?*

[20] The Applicant alleges that the RAD's decision is riddled with errors that make it unreasonable. These include: that it performed unreasonable analyses regarding the Chuanpiao, the Golden Shield program, the Applicant's failure to claim status in the US, and the Applicant's Falun Gong identity; and that it did not address the Applicant's arguments on appeal. The submissions were lengthy but they are summarized briefly below.

(1) Did the RAD unreasonably analyse the Chuanpiao, the Golden Shield Program, the Applicant's failure to claim status in the United States, or the Applicant's Falun Gong identity; and did the RAD unreasonably fail to respond to the Applicant's arguments?

(a) *The Chuanpiao*

[21] The Applicant claims that the RAD unreasonably assessed the Chuanpiao by dismissing it because it was different in appearance from a Chuanpiao template obtained from the Chinese government. The Applicant submits that the RAD noted the highly inconsistent and corrupt policing system, yet reached its conclusion because the Chuanpiao in question was not the same as Chinese "standard documents." For the Applicant, this was unreasonable.

[22] The Respondent submits the analysis was reasonable. For it, the Applicant has failed to show how, just because the Chinese system is corrupt, this leads to documents being inconsistent there. He notes that this Court has held that similar inconsistencies have been reasonable bases for disputing a document's authenticity. The Respondent also notes that the RAD is aware that fraudulent documents are readily available in China and the RAD is entitled to rely on its knowledge of this.

(b) *The Golden Shield Program / Ability to Exit China*

[23] The Applicant submits that the RAD conducted an unreasonable analysis of the Golden Shield program in China to conclude that the Applicant could not have left China on his own passport while wanted by authorities, stating that the RAD did not properly understand that the Applicant used a professional smuggler to escape, not his own passport. He submits that the smuggler's techniques are not known to the RAD. The Applicant also cites this Court in *Huang v Canada (Citizenship and Immigration)*, 2017 FC 762 [*Huang*] to show how it might not be reasonable to believe that the Golden Shield program is effective, knowing how bribery and corruption are rampant in the Chinese system.

[24] The Respondent submits that it is reasonable for the RAD to find that a wanted person cannot exit China with their own passport. It claims that the cases cited by the Applicant are distinguishable because, unlike in those cases, the RAD here upheld the RPD's determination that they disbelieved the Applicant's story about how he escaped China, among other reasons. It notes that there are a number of cases relying on findings made in the Jurisprudential Guide as well.

(c) *Failure to Claim in the United States*

[25] The Applicant argues that the RAD unreasonably considered the Applicant's failure to claim refugee status in the US, finding that is was "unclear" how this fact could be used in assessing the Applicant's credibility.

[26] The Respondent cites a line of cases supporting the proposition that the RAD may consider whether a claimant made efforts to claim asylum in countries en route to Canada. It notes that it has been held that this can be a "central issue" in assessing subjective fear.

(d) *Falun Gong Identity*

[27] The Applicant alleges that the analysis of the Applicant's Falun Gong identity was unreasonable because the RAD found that he was not a genuine practitioner. The Applicant claims that the RAD acted contrary to the evidence, and noted that the RAD did not consider that Falun Gong is a loose and nebulous organization—there are few "official documents" that could identify him as a member.

[28] The Respondent cites a number of cases supporting the RAD's analysis of the Applicant's Falun Gong identity. These include cases where the case law supports a claimant's previous credibility findings casting doubt on the Applicant's future positions, cases noting that a high degree of proof is required for *sur place* claims where other elements are not considered credible, and cases finding that religious practices in Canada may not be sufficient to overcome previous credibility findings.

(e) *Applicant's Arguments on Appeal*

[29] The Applicant claims that the RAD did not fully engage with all of the Applicant's arguments, instead dismissing its appeal on its own analysis of the Chuanpiao, the Golden Shield, and the Applicant's failure to seek protection in the US.

[30] The Respondent notes that the RAD did not need to engage fully with all arguments before them because they found that the above issues were determinative of the appeal. For it, there is no need to address peripheral concerns when the claim can be determined on central issues alone.

VI. Analysis

A. *Did the RAD breach procedural fairness?*

[31] I find that there has been no breach of procedural fairness in the RAD's treatment of the Chuanpiao or the Golden Shield program. The Chuanpiao and the Golden Shield program both are related to the Applicant's ability to flee China. Respecting the Golden Shield program, this is

discussed in the National Documentation Package. Once the Applicant has raised an issue for the RAD's review, there is no obligation for the RAD to inform the Applicant of the analyses it will perform toward determining that issue. This is particularly so because the *Applicant himself* was the one who raised these issues in the first place when he submitted that the RPD made "unreasonable credibility findings." The Applicant had also previously argued these points before this Court and the arguments were rejected (*Mao v Canada (Minister of Citizenship and Immigration)*, 2018 FC 891 at paras 6-8, 19-20).

[32] The Respondent has correctly cited many cases that stand for the proposition that it is not a breach of procedural fairness to make an independent assessment of the evidence in the record (*Bebri v Canada (Minister of Citizenship and Immigration)*, 2018 FC 726 at para 16). I agree.

[33] The RAD also did not breach procedural fairness by relying on the Jurisprudential Guide. Justice Gleeson, in *Feng v Canada*, 2019 FC 18 [*Feng*], discussed the issue of whether the RAD was required to provide notice before relying on a new jurisprudential guide. The Court found that the Applicant's procedural rights were not breached by doing so (*Feng* at paras 17-26). In this case the Jurisprudential Guide was valid at the time the RAD rendered its decision and, in any event, the Jurisprudential Guide was revoked on grounds that do not arise on the facts of this application.

B. *Was the RAD's decision unreasonable?*

(1) Did the RAD unreasonably analyse the Chuanpiao, the Golden Shield Program, the Applicant's failure to claim status in the United States, or the Applicant's Falun Gong identity; and did the RAD unreasonably fail to respond to the Applicant's arguments?

(a) *The Chuanpiao*

[34] There is plenty of case law establishing that the Board is entitled to compare documents to sample government documents to determine authenticity. In *Liu v Canada (Citizenship and Immigration)*, 2011 FC 262 at para 8, Justice Rennie found that it was reasonable for the Board to "expect that the applicant's summons should bear some resemblance to one of these three types of summons" when the board had access to similar Chinese sample documents. In *Chen v Canada (Citizenship and Immigration)*, 2011 FC 187 at para 10, Justice Zinn approved of the RAD finding that a Chinese summons was inauthentic because it lacked certain features that they expected to be present. In *Zhuo v Canada (Citizenship and Immigration)*, 2012 FC 790 at paras 6-9, Justice Mactavish found that inconsistencies in documents, combined with knowledge that fraudulent documents are prevalent in China, supported the Board reasonably finding that a Chinese document was inauthentic.

[35] The Applicant argues that the documentary evidence indicates that policing standards in China are inconsistent, to support an argument otherwise. Although this should certainly give the RAD a healthy amount of caution if true, it does not restrict their ability to decide to the contrary with a reasonable analysis. I cannot find that the RAD's analysis of the Chuanpiao was unreasonable in this case with the evidence before it. I have found no clear analytical error on the part of the RAD.

(b) *The Golden Shield Program / Ability to Exit China*

[36] I find that the RAD reasonably concluded that the Applicant could not have exited China with his own passport in light of the Golden Shield program.

[37] The Applicant argues that a corruption and bribery scheme was present in the form of the smuggler that he used to exit China and he cites *Liang v Canada (Citizenship and Immigration),* 2019 FC 90 [*Liang*] and *Huang*. Below is *Liang* at para 20:

> The objective country evidence documents note the potential for bribery and corruption in China and note that the Golden Shield system is not infallible. The RPD relied on the *Huang* decision that states that issues of bribery, smugglers, and corruption are to be considered when assessing a claimant's ability to leave China using their genuine passport. In *Huang*, Justice Russell indicated at paragraph 68 that, where there is sufficient evidence of corruption and a bribery scheme, a reasonable decision must explain why these factors could not have reasonably overcome the Golden Shield.
>
> [Emphasis added.]

[38] The Respondent notes that *Liang* is distinguishable. In *Liang,* the Court determined that the Board engaged in circular reasoning and the decision was struck down. However, the Court there noted that *Huang* requires an explanation only when there is *sufficient evidence* that corruption or a smuggler was involved. The RAD was persuaded by the preponderance of documentary evidence indicating that it was not possible for a wanted person to exit China. In addition, the RAD found that there was insufficient evidence on the record related to the efforts undertaken by the smuggler.

[39] Further, the Respondent notes that *Jiang v Canada (Citizenship and Immigration),* 2018 FC 1064, *Yan v Canada (Citizenship and Immigration),* 2017 FC 146, and *Sui v Canada*

(Citizenship and Immigration), 2016 FC 406 [*Sui*], distinguish the Applicant's "similar cases." I agree. I quote the following passage from *Sui* at para 42:

> […] the most recent evidence indicates that the authorities in China have expanded the breadth and complexity of its information sharing regime, have tightened security at airports, and have arrested wanted individuals who tried to escape. The respondent also cites the recent decision in *Ma v Canada (Citizenship and Immigration)*, 2015 FC 838 (CanLII) which found at para 53 that the RPD had been reasonable in finding that it was implausible that a person who was sought for arrest would be able to leave China undetected using her own genuine passport.

[40] Therefore, where the evidence before the RAD does not establish that smuggling was involved or if there is a lack of evidence relating to the efforts or tactics used by the smuggler, it will necessarily be difficult to show that an Applicant could have overcome the Golden Shield program. The RAD's analysis was reasonable in light of the evidence before it.

(c) *Failure to Claim in the United States*

[41] The Applicant, citing *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 6-8, argues that the RAD has applied "unreasonable expectations of behavior" in being sceptical of why the Applicant did not claim refugee status in the US while he was in transit there. The Applicant claims that the Applicant's failure to claim asylum in the US was a "key consideration" in the RAD's decision, but nowhere is that mentioned (the RAD only says that it was *a* consideration).

[42] The Respondent correctly notes that, in *Garavito Olaya v Canada (Citizenship and Immigration)*, 2012 FC 913, paras 54-55, the Court approved of the RAD considering failures to

claim refugee status in the US, even when there for a short time. The Respondent's citation of *Rana v Canada (Citizenship and Immigration),* 2012 FC 453 at paras 28-32, is also directly on point—there, it was held to be reasonable for the Board to make a negative credibility finding based on such failures.

[43] I see nothing unreasonable about the RAD's decision in this respect. The Applicant's arguments that he was young in age and would "have better chances in Canada" are not persuasive in challenging the reasonableness of the RAD's analysis.

(d) *Falun Gong Identity*

[44] I also do not find that the RAD's analysis of the Applicant's Falun Gong identity was unreasonable.

[45] The Respondent correctly notes that (a) prior adverse credibility findings can cast doubt on the veracity of the Applicant's position, (b) a high degree of proof is required for a *sur place* claim where other elements of the claim have been deemed not credible, and (c) religious practice in Canada is not always sufficient to overcome previous adverse credibility findings.

[46] The RAD noted that the Applicant's previous adverse credibility findings affected the analysis as to whether he was a genuine practitioner. Much like in *Chen v Canada (Citizenship and Immigration),* 2017 FC 650 at para 19, it remains difficult to show genuine belief when an adverse credibility finding has been established elsewhere:

> the RAD's findings with respect to the *sur place* claim were intelligible and justifiable: letters from a priest at a Catholic Church in Canada, and from parishioners, were simply insufficient to establish the genuineness of the Applicant's claimed Catholic belief, on a balance of probabilities, for the purposes of a *sur place* claim, particularly in light of the findings with respect to his involvement in China

[47] With this in mind, this aspect of the RAD's analysis was reasonable.

(e) *Applicant's Arguments on Appeal*

[48] The Applicant argues that the RAD decision was unreasonable because the RAD "failed to address the Applicant's arguments."

[49] As cited by the Respondent, the RAD is not obliged to consider every peripheral issue but only those determinative to the case before them. The Supreme Court in *Vavilov* has recently confirmed that there is no need for a decision maker to engage with every argument—it is enough that they are alive and aware of them (*Vavilov* at para 128). I have evaluated the RAD's decision and it appears to have been alive to the key issues and arguments. The panel is not obliged to respond to each of the Applicant's arguments on appeal.

VII. Conclusion

[50] For the reasons above, the application for judicial review is dismissed.

[51] Neither party has submitted a question for certification and, in my view, no such question arises.

[52] There is no order for costs.

JUDGMENT in IMM-543-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

3. There is no order for costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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