

Federal Court



Cour fédérale

Date: 20220110

Docket: IMM-1618-20

Citation: 2022 FC 24

Toronto, Ontario, January 10, 2022

PRESENT: Madam Justice Go

BETWEEN:

JIAJUN GONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. **Overview**

[1] This is an application for judicial review brought by Ms. Jiajun Gong [Applicant] of a decision of the Refugee Appeal Division [RAD] dismissing her appeal from a decision of the Refugee Protection Division [RPD]. The RPD rejected the Applicant's claim for protection under section 96 and section 97 of the *Immigration and Refugee Protection Act* [IRPA], on the ground that she lacked credibility.

[2] The RAD decision [Decision] relies on inconsistencies between the Applicant's two port of entry [POE] interviews, between her POE interviews and her narrative before the Board, and between her narrative and the documentary evidence. The Applicant argues that the RAD unreasonably relied on the POE interviews, ignored that her misrepresentations were made in order to gain entry to Canada to claim asylum, unreasonably assessed the documentary evidence on her exit from China, had an unreasonable expectation of the proof she could provide, and dismissed evidence of her Falun Gong practice.

[3] For the reasons set out below, I find the Decision reasonable and I dismiss the application.

II. **Background**

A. *Factual Context*

[4] The Applicant is a citizen of China. According to her Basis of Claim [BOC] narrative, she had a child in 2005 and another one in 2010. When she became pregnant again in 2015, the family planning office in her town forced her to have an abortion. After the abortion, she felt exhausted and experienced pain. In January 2017, her friend suggested that practicing Falun Gong could improve her health and happiness. The Applicant found that Falun Gong practices helped her sleep better and gave her energy, so she joined her friend's underground Falun Gong group in April 2017.

[5] The Applicant claimed that her Falun Gong group was raided by the Public Security Bureau [PSB] on May 21, 2017, and some of the members were arrested. The Applicant, who was not present on the day of the raid, learned of the arrests and immediately went into hiding.

[6] The Applicant alleged that three days later she heard from her mother that the PSB had come to her home to look for the Applicant. The Applicant was in hiding between May 2017 and April 2018. During that time the Applicant worked as wait staff in a restaurant. The Applicant's relatives found an agent to arrange for her escape from China in April 2018.

B. *Interviews with Canada Border Services Agency*

[7] The Applicant arrived in Canada on April 14, 2018 and was detained by the Canada Border Services Agency [CBSA]. The Applicant told a CBSA officer that she was coming to Canada as a tourist. However, she had no proof of itinerary, hotel bookings, or return flight. When she was refused entry, she then stated that she was seeking protection against China because she wanted to have a second child but was forced to get an abortion.

[8] On the following day, during an interview with another CBSA officer, the Applicant stated that she was afraid because she was pregnant and was forced to have an abortion about three years prior. Additionally, she stated that she already had two children and was afraid of the government finding out. She noted that while her children were not with her, she planned to bring her family to Canada if she were granted refugee status.

[9] The Officer's notes also state that she admitted to giving the previous officer false information about a number of things, including her parents' names, as she had been scared that the government of China would find out that she was in Canada.

[10] The Applicant did not mention Falun Gong during these interviews.

C. *Additional Evidence Before the Board*

[11] In addition to her narrative, which relays the events related to her Falun Gong practice outlined above, the Applicant also provided to the RPD a letter from a fellow Falun Gong practitioner in Canada, stating that they have been attending Falun Gong parade activities together, as well as photos of these activities. Additionally, she provided a letter from her brother, as well as a summons ordering her to appear at the PSB for "alleged crimes of Falun Gong and disturbing social order."

D. *The RPD Decision*

[12] The RPD held a hearing on November 23, 2018 and rejected her claim on December 7, 2018, finding that the determinative issue was credibility.

[13] According to the RPD decision, the Member asked the Applicant to explain discrepancies between her Temporary Resident Visa application, which states that she worked at a hotel, and her Schedule A form, which states that she worked at an insurance company. The Applicant indicated that she was told by the smuggler to say that she met him at the hotel where she

worked. The RPD Member drew a negative inference from the fact that she lied to the officer when first entering Canada.

[14] The RPD further noted that in her interviews with the CBSA, she stated that she was seeking protection related to the family planning office but made no mention of Falun Gong. At the hearing, she stated that she had not mentioned Falun Gong because she was afraid that the Chinese government might become aware of her through the Canadian government. The RPD found this unreasonable.

[15] When the RPD Member asked her about the passport she used to travel to Canada, the Applicant said that while in hiding, she had applied for a new passport with the assistance of a smuggler. The RPD found it unreasonable that she would go to a government office to renew her passport if the government was looking for her. The RPD also found it unreasonable that she would have worked in a public-facing job at a restaurant while in hiding, if the authorities were really pursuing her.

[16] Due to documentary evidence on the government of China's exit controls (the "Golden Shield Project"), the RPD found it unlikely that she would have been able to exit China on her own passport if she was wanted by the authorities.

[17] The RPD questioned the Applicant on her Falun Gong practice and concluded that while she had some knowledge of basic concepts, she did not demonstrate sufficient facility with Falun Gong concepts to establish that she was a genuine practitioner. The RPD placed little weight on

the evidence of her practice since arriving to Canada, as the photos were undated and the writer of the letter did not testify at the hearing, concluding that she attended Falun Gong activities in Canada solely to buttress her refugee claim.

E. *Decision under Review*

[18] The Applicant appealed the RPD decision to the RAD. In a decision dated February 26, 2020, the RAD found that the Applicant ought not to be faulted for misrepresentations made in an effort to enter Canada in order to seek asylum, and thus did not consider any misrepresentations in her visa application or any contradictions between the information in that form and her current information. The RAD found that it was unlikely, but not implausible, that she would have worked at a restaurant while in hiding and that she demonstrated sufficient knowledge of Falun Gong.

[19] However, the RAD did consider the Applicant's misrepresentations made to CBSA officers after she arrived in Canada, in particular her failure to mention Falun Gong. The RAD also upheld the RPD's finding that it was unlikely she could have obtained a new passport or exited China on her own passport if the authorities had been seeking her, and agreed with the RPD that her evidence of Falun Gong practice in Canada was of limited probative value.

[20] The RAD concluded that after weighing the factors above, the Applicant was not credible: on a balance of probabilities, she did not practice Falun Gong in China, was not being pursued by the PSB, and only practiced Falun Gong in Canada to "deceive the Board."

[21] The RAD further concluded that she had no *sur place* claim because the government of China had no way of knowing that she had been practicing Falun Gong in Canada.

III. Issues

[22] The issue in this application is whether the RAD's assessment of the Applicant's credibility was reasonable. The Applicant's arguments, somewhat disjointed, can be divided into the following sub-issues:

- A. *Did the RAD unreasonably rely on CBSA interviews?*
- B. *Was it unreasonable to conclude that the Applicant "lied"?*
- C. *Were the RAD's conclusions on the Applicant's exit from China unreasonable?*
- D. *Did the RAD have an unreasonable expectation of the proof that the Applicant could provide?*
- E. *Was the RAD's assessment of the Applicant's Falun Gong practice unreasonable?*

[23] Of those, issue (B) raised by the Applicant is misplaced, since it was the RPD decision, and not the RAD Decision which states that the Applicant "lied." In her written submission to this Court, the Applicant appears to have re-used portions of her previous submissions to the RAD, which were more aptly applied to the RPD decision. I note further that the RAD acknowledged the Applicant's argument that she did not "lie", and went on to distinguish her misrepresentations to gain entry to Canada from her misrepresentations upon arrival to Canada. I would however address issue (B) in the context of issue (A) as the two are related.

[24] I also find that issues (C) and (D) are linked and will address them both at the same time.

[25] There are other instances where the Applicant's submission appears to be directed at the RDP and not the RAD. I will not address those aspects of the Applicant's submission.

IV. Standard of Review

[26] The presumptive standard of review of the merits of an administrative decision is reasonableness: *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at para 25. The RAD decision is to be reviewed on the standard of reasonableness: *Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296, at para 8. A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”: *Vavilov*, at para 85. The onus is on the Applicant to demonstrate that the RAD decision is unreasonable. To set aside a decision on this basis, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency”: *Vavilov*, at para 100.

V. Analysis

A. *Did the RAD unreasonably and unduly rely on CBSA interviews?*

[27] The Applicant argues that it was unreasonable for the RAD to state that the CBSA must be able to “rely upon claimants to be truthful in order to discern who is a genuine refugee”, as the CBSA “merely decides eligibility for exclusion” and does not decide who is a refugee. The

Applicant submits that if the CBSA has taken on that role, or if the RAD believes that is the CBSA's role, then the POE notes should be excluded from evidence. The Applicant contends that the first 15 paragraphs of the RAD decision, which focus on the CBSA's notes, show that the RAD relied on these notes "based on the misguided notion that they are a refugee determination process."

[28] The Respondent counters that the RAD was simply making the point that the CBSA requires truthfulness in examinations, and that the Applicant has disconnected one of the Member's statements from the rest of his reasoning. I agree with the Respondent's assessment of that particular sentence, which should be read in the context of the Decision as a whole.

[29] Neither of the parties refer to any case law in their respective factum to support their positions on the issue regarding the reliance by RPD and RAD on POE interview notes. At the hearing, the Applicant referred to a recently released decision from this Court and relied solely on that case: *Khan v Canada (Citizenship and Immigration)*, 2021 FC 1177 [*Khan*]. I will come back to *Khan*, after reviewing the jurisprudence to date.

[30] The jurisprudence establishes that the RPD may consider an applicant's statements to immigration authorities at the port of entry, and that material omissions and inconsistencies among port of entry notes, BOC narrative and oral testimony at the hearing can properly form the basis of an adverse credibility finding where the omission or inconsistency is central to the claim.

[31] As Justice Walker explained in *Gaprindashvili v Canada (Citizenship and Immigration)*, 2019 FC 583 [*Gaprindashvili*] at para 24:

[24] The jurisprudence of this Court establishes that an applicant's statements to immigration authorities at the POE may be considered by the RPD (*Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 15). One or more material omissions and inconsistencies among an applicant's POE notes, basis of claim narrative and oral testimony at an RPD hearing can properly form the basis of an adverse credibility finding where the omission(s) or inconsistency(ies) is or are central to the claim (*Eze v Canada (Citizenship and Immigration)*, 2016 FC 601 at para 20). The RPD must assess the nature of the omission or inconsistency and its impact on the applicant's refugee claim (*Shatirishvili v Canada (Citizenship and Immigration)*, 2014 FC 407 at paras 29-30):

[29] It is also open to the Board to base credibility findings on omissions and inconsistencies between POE notes, PIFs and a claimant's testimony at the hearing (*Sheikh v Canada (Minister of Employment and Immigration)*, 1990 CanLII 8017 (FCA), [1990] 3 FC 238 (CA); *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668 at para 18).

[30] However, not all omissions will be sufficient to ground a negative credibility finding. In *Naqui v Canada (Minister of Citizenship and Immigration)*, 2005 FC 282, the Court stated at para 23 that “[t]he nature of the omission, and the context in which the new information is brought forward, have to be examined in order to determine the materiality of the omission.”

[32] The jurisprudence also establishes that “the Board should be careful not to place undue reliance on the POE statements. The circumstances surrounding the taking of those statements is far from ideal and questions about their reliability will often arise”: *Wu v Canada (Citizenship and Immigration)*, 2010 FC 1102 [*Wu*], at para 16. Nevertheless, in *Wu*, the Court found the decision of the Immigration and Refugee Board to reject the applicant's claim to be reasonable, as there were significant differences between Mr. Wu's evidence at the hearing of his refugee claim and the record of his statements when he arrived at the POE into Canada.

[33] Furthermore, “[i]n evaluating the applicant's first encounters with Canadian immigration authorities or referring to the applicant's Port of Entry Statements, the Board should also be mindful of the fact that ‘most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority’: see Prof. James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworth, 1991) at 84-85”: *Lubana v Canada (Citizenship and Immigration)*, 2003 FCT 116, at para 13.

[34] In *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8, at para 51, the Court stated that it is an error to impugn an applicant's credibility on the sole ground that information provided at the port of entry lacks details: “[t]he purpose of the POE interview is to assess whether an individual is eligible and/or admissible to initiate a refugee claim. It is not a part of the claim itself and, consequently, it should not be expected to contain all of the details of the claim.”

[35] Having canvassed the case law, I find that the key question appears to be whether inconsistencies between a claimant's statements at the port of entry and testimony before the Board are about “crucial elements of a claim” so as to sufficiently taint the claimant's credibility: *Chen v Canada (Citizenship and Immigration)*, 2005 FC 767, at para 23.

[36] The Applicant argues that there is no contradiction between her refugee claim narrative and the statement she gave at the POE interview because a claim based on family planning is totally different from a claim based on fear due to her Falun Gong practice. The Applicant submits that making the same claim but providing different information about it is worse than

making a completely different claim altogether. This Court should come to the same conclusion as Justice Pallotta did in *Khan*, the Applicant argues, because the claimants in *Khan* did something worse than what the Applicant did, by changing the identity of the agent of persecution, as opposed to filing a totally different claim.

[37] At the hearing, counsel for the Applicant further suggested that the Applicant did not lie to the CBSA, only omitted her Falun Gong claim. Counsel also argued that the Applicant is entitled to not rely on her family planning claim at the RPD hearing due to a change in family planning law in China. Counsel did not elaborate what he meant by the change of the family planning law. I presume he was referring to the change made by the Chinese Government from restricting families to having one child only to two children. But the law in question was changed in 2015, three years prior to the Applicant's arrival in Canada and as such would not have accounted for the Applicant's change of her claim after her arrival.

[38] The Respondent counters that to assess whether the Applicant's misrepresentation goes to the central element of her claim, the Court must first determine what the central element of her claim is. In this case, it is the Applicant's claim that she is a Falun Gong believer, the very claim that she neglected to mention at the POE interviews, even after being asked by the CBSA officer if there was any other incident she wanted to add. In this regard, the Respondent submits *Khan* can be distinguished because in *Khan*, Justice Pallotta found it was not clear from the record whether the claimant had "ample opportunity" to provide information at the POE interview, and that the RAD did not adequately respond to the claimant's explanation that she tried to add more detail, but it was not recorded. That was not the case here.

[39] The Respondent further submits there is no logic to the Applicant's argument that changing one aspect of the claim is worse than changing the claim entirely. Even if that were the case, the Respondent submits it was still reasonable for the RAD to be concerned about the Applicant coming up with a completely new story altogether.

[40] In the context of this case, I find that the issue of Falun Gong is a crucial element of the Applicant's claim, and is not in any way a peripheral issue. I also find that the RAD reasonably came to the same conclusion when it noted that "the reasons she has given for seeking asylum go to the very essence of her claim and the fact that she changed her evidence in this regard severely undermines her credibility."

[41] Indeed, the Falun Gong issue is the *only* element of the Applicant's claim, since she did not pursue the forced abortion issue before the RPD and the RAD. Yet she omitted to mention this crucial issue at the POE interview, even after she was asked by the CBSA if there were any other incidents she would like to tell the officer about.

[42] I agree with the Respondent that *Khan* can be distinguished on facts. There was nothing in the record to suggest that the Applicant had wanted to give details about her Falun Gong practice. On the contrary, the Applicant was given two opportunities to provide such details to the CBSA yet failed to do so each time.

[43] The Applicant submits she did not tell the CBSA officials the full truth because she was afraid they would share information with the Chinese government. She argues her explanation

for this omission is reasonable, as she only lied for the purposes of gaining entry to Canada to seek asylum. After noting the inconsistencies between her port of entry interviews (i.e. number of children, names of parents, purpose of her trip, whether she was meeting anyone), the RAD concluded that it is unlikely that someone who is seeking the protection of Canada would not trust Canadian officials enough to be honest.

[44] I agree with the Respondent that the RAD did not ignore the Applicant's explanation for her failure to disclose her Falun Gong practice at the POE – another fact that distinguishes this case from *Khan*. The RAD addressed the Applicant's explanation directly and provided its rationale for rejecting it. It was within the RAD's jurisdiction to consider and weigh the evidence and any inconsistencies that may arise. The Applicant may disagree with the RAD's determination, but I do not see any error that would warrant this Court's interference.

[45] In conclusion, I find the RAD has reasonably distinguished the Applicant's misrepresentations to gain entry to Canada from her misrepresentations upon arrival to Canada. In my view, the stark inconsistencies between the Applicant's POE interviews and the narrative in her refugee claim, and the complete omission of the central element of her refugee claim, reasonably supported the RAD's conclusion that the Applicant had later added the narrative about Falun Gong in order to bolster her claim.

B. *Were the RAD's conclusions on the Applicant's exit from China unreasonable and did the RAD have an unreasonable expectation of the proof that the Applicant could provide?*

[46] The Applicant argues that the RAD's reference to country documents was very general and did not demonstrate that the Applicant would be excluded from getting a passport or that the passport office somehow shares information with the police.

[47] The Applicant also argues that it was unreasonable for the RAD to expect her to provide evidence of how the smuggler was able to circumvent China's system of exit control, as the smuggler would likely have not revealed his methods (especially if they involved bribery).

[48] According to the Applicant, by finding that "there is nothing in the evidence to indicate that the Appellant left China without having her passport scanned", the RAD was unreasonably asking her to prove that her passport was not scanned upon exit. The Applicant argues that it would be virtually impossible to provide such evidence. At the hearing, the Respondent conceded that it might be impossible for the Applicant to provide such evidence, but argued that this was not the only basis upon which the RAD rejected the appeal.

[49] While I agree with the Applicant that it was not reasonable for the RAD to expect the Applicant to explain what the smuggler may have done to help her navigate the exit system in China, I find that the Decision reasonably detailed how the RAD assessed the issue about the Applicant's exit as a whole, based on the country documents and based on the Applicant's own testimony.

[50] The RAD acknowledged that the Golden Shield used by the Chinese Government to “[connect] the various agencies and levels of command within the public security apparatus” is not “perfect and that there may be uneven application at times or possible corruption.” When it concluded that the Applicant failed to provide some evidence of how a smuggler would have been able to circumvent the Chinese government’s controls, it also took into account the fact that the Applicant applied in person to the entry-exit control department of the public security organ – despite her claiming to be in hiding from the PSB. The RAD also rejected the Applicant’s argument that the passport was possibly a counterfeit when the Applicant herself stated in her POE that it was genuine. It was in light of the totality of the evidence that the RAD found it highly unlikely that the Applicant would have been in a position to obtain a new passport while she was actively being sought by the PSB – a conclusion that I find reasonable.

C. *Was the RAD’s assessment of the Applicant’s Falun Gong practice unreasonable?*

[51] The Applicant argues that it was up to the RPD to point out inconsistencies between the Applicant’s knowledge of Falun Gong and the documentary evidence, which it did not. This argument is misplaced given that the RAD accepted that she had adequate knowledge of Falun Gong.

[52] Additionally, the Applicant argues that the RPD dismissed the evidence of her Falun Gong practice in Canada (i.e. photos and a letter of support) without giving a reason. Again, this argument was made to the RAD, and the RAD responded to it, as it concluded that the photos and letter were of limited value, and that it would have regard to these documents while assessing her overall credibility. The RAD’s conclusion in this respect was reasonable.

VI. **Certification**

[53] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[54] The application for judicial review is dismissed.

JUDGMENT in IMM-1618-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question to certify.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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