

Federal Court



Cour fédérale

Date: 20221201

Docket: IMM-6187-20

Citation: 2022 FC 1652

Ottawa, Ontario, December 1, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

XIAOYU TAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Xiaoyu Tan [Applicant] seeks judicial review of the Refugee Appeal Division's [RAD] November 3, 2020 decision wherein the RAD agreed with the Refugee Protection Division [RPD] that the Applicant is not a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Decision].

[2] The application for judicial review is granted.

II. Background

[3] The Applicant is a Chinese citizen who fears persecution at the hands of the Chinese authorities due to her profile as a Falun Gong practitioner.

[4] The Applicant alleges that her neck and shoulder pains prompted her to learn Falun Gong in September 2017. After joining a group who practiced Falun Gong weekly, then bi-weekly in their homes, on August 25, 2018, the Applicant alleges that the group was raided by Chinese authorities and some members were detained. The Applicant escaped and went into hiding at her cousin's home.

[5] On August 26, 2018, the Public Security Bureau [PSB] went to her father's home to look for the Applicant and interrogate him about the Applicant's activities. On August 28, 2018, a summons was delivered to her father's home. The PSB also searched for the Applicant at her relatives' homes and she was dismissed by her employer as a result of the PSB's inquiries.

[6] With the help of a smuggler, the Applicant obtained a Canadian visa. On December 10, 2018, the Applicant fled to Canada and made a claim for refugee protection. The Applicant continues to practice Falun Gong in Canada. She states that the PSB continues to look for her in China and the practitioners from her group are still detained.

[7] The RPD rejected the Applicant's refugee claim due to credibility concerns. In particular, the RPD raised concerns about the Applicant's claim of exiting China using her own passport, that the PSB did not issue a summons, that she was not wanted by the Chinese authorities, and that she was not a genuine Falun Gong practitioner. The RPD found the Applicant engaged in Falun Gong activities in Canada to bolster her refugee claim. The RPD further found no indication that her activities have come to the attention of Chinese authorities; therefore, there was no objective basis for her fear of persecution upon her return to China.

III. The Decision

[8] The RAD confirmed the RPD's decision that the Applicant was not a genuine Falun Gong practitioner and that she was not wanted by the Chinese authorities. The RAD determined that the RPD did not err in its assessment of the Applicant's credibility.

[9] The RAD found that the Applicant's summons notice was not genuine, as it was not consistent with the objective information in a sample included in the National Documentation Package [NDP]. Taken together with the RPD's findings that the Applicant was not a genuine Falun Gong practitioner, that the Chinese authorities were not looking for her, and that there was a widespread availability of fraudulent documents in China, the RAD found the summons notice was not genuine. These findings led the RAD to conclude that the Applicant was not credible overall. Given that the RAD found the Applicant had submitted a fraudulent summons and was not wanted by the Chinese authorities, the RAD concluded that the RPD was correct in finding that the Applicant did not have issues leaving China on her own passport.

[10] The RAD further found that the RPD did not err in finding that the Applicant was not a genuine Falun Gong practitioner. The RAD found that the RPD considered the Applicant's level of education in evaluating her testimony and determined she lacked the knowledge reasonably expected from someone of her alleged level of practice. In particular, the RAD found it was reasonable for the RPD to determine that a genuine practitioner would be familiar with the content of Zhuan Falun.

[11] Lastly, the RAD determined that the Applicant failed to establish a *sur place* claim based on her Falun Gong practice. The RAD also found that there was insufficient evidence that the Applicant's Falun Gong activities in Canada were likely to come to the attention of the Chinese authorities. The RAD found that the Applicant's arguments of being photographed or monitored by Chinese authorities were speculative, and that the objective evidence indicated little about the monitoring of Falun Gong practitioners outside of China.

IV. Issues and Standard of Review

[12] The Applicant's written submissions frame the issues as follows:

1. Did the RAD determinatively err in finding that the Applicant tendered a fraudulent summons?
2. Did the RAD fail to consider all of the evidence?
3. Did the RAD err in finding that the Applicant is not a genuine Falun Gong practitioner?

[13] The Respondent submits the issues are as follows:

1. Should this Court strike the affidavit of Liling Shen?
2. Has the Applicant raised an arguable case or serious issue?

[14] Having considered the parties' written and oral submissions, the preliminary issue in the present matter is whether the affidavit of Liling Shen is properly before this Court. The substantive issues are best characterized as:

1. Whether the RAD breached procedural fairness and was unreasonable in coming to its finding that the Applicant tendered a fraudulent summons.
2. Whether the RAD failed to consider the Applicant's employment dismissal letter.
3. Whether the RAD erred in finding that the Applicant is not a genuine Falun Gong practitioner.

[15] The standard of review for the merits of the Decision is reasonableness. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be "justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 55). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the

decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

[16] The standard of review for procedural fairness is essentially correctness (*Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at paras 49, 54 [*CP Railway*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). The Court has no margin of appreciation or deference on questions of procedural fairness. Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837-41 [*Baker*]).

V. Preliminary Issue

[17] The Respondent submits that the affidavit of Liling Shen, addressing alleged translation errors related to the summons, was not before the RAD; therefore, it is not admissible on judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20). While there are exceptions to the rule against receiving new evidence not before the decision-maker, none of those circumstances are present. The Applicant did not advance any written submissions on this issue.

[18] I agree that the affidavit is inadmissible. The affidavit of Liling Shen, which was not before the RAD, raises errors and omissions in the Chinese to English translation of the

Applicant's summons. While there is an exception to the general rule against the admission of new evidence where the evidence addresses issues of procedural fairness, the affidavit does not fall within this exception (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 25-26). Firstly, the affidavit does not speak to a procedural fairness issue before the RAD. Instead, it attempts to rebut the RAD's additional findings on the genuineness of the summons. Further, the translation issue was present before both the RPD and the RAD. Although it was only the RAD who made findings on the format of the summons in impugning its authenticity, the Applicant was able to raise the translation issue before the RAD.

VI. Analysis

A. *Whether the RAD breached procedural fairness and was unreasonable in coming to its finding that the Applicant tendered a fraudulent summons?*

(1) Applicant's Position

[19] The RAD erred in finding that the Applicant tendered a fraudulent summons. It was procedurally unfair for the RAD to rely on new grounds, namely the differences in the name of the statute and the title of the summons notice as compared to the NDP sample, to arrive at its conclusion without providing the Applicant an opportunity to respond (*Fu v Canada (Citizenship and Immigration)*, 2017 FC 1074 at para 14). The inconsistencies were merely translation issues and could have been addressed if the Applicant was given the opportunity to respond.

[20] Additionally, it was unreasonable for the RAD to rely on these translation inconsistencies, as the original version of the summons is consistent with the sample provided in

the NDP. The RAD's finding that the Applicant tendered a fraudulent summons was determinative to the appeal. Accordingly, if this Court finds that the RAD's conclusion was unreasonable, judicial review should be granted on this basis alone.

(2) Respondent's Position

[21] The RAD's additional findings on the authenticity of the summons was not a new issue and did not warrant an opportunity for the Applicant to respond. While the RPD did not impugn the credibility of the summons on the basis of its format as compared to the NDP sample, the RPD concluded that the summons attracted little weight due to the lack of security features, the prevalence of fraudulent documents in China, and the Applicant's ability to leave China on her passport without issue—findings that the RAD confirmed. The RAD's findings on the format of the summons merely supplemented the RPD's reasons. Further, the evidence of the translation issues was not before the RAD.

(3) Conclusion

[22] The RAD did not breach the Applicant's right to procedural fairness. The authenticity of the summons was not a new issue, as the Applicant knew that its authenticity was a live issue arising from the RPD's decision.

[23] While the RAD made additional findings in support of its conclusion that the summons was not genuine, these findings arose from inconsistencies on the face of the summons and its English translation. The RAD did not breach procedural fairness in finding an additional basis to

question the authenticity of the summons (*Han v Canada (Citizenship and Immigration)*, 2021 FC 1390 at para 32; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13).

[24] I also find that the RAD's reliance on the inconsistencies in the English translation, as compared to the NDP sample, was also reasonable. I agree with the Respondent that evidence of any errors in the English translation was not before the RAD. The onus was on the Applicant to put her best foot forward and ensure the English translation of the summons was accurate (*Gu v Canada (Citizenship and Immigration)*, 2017 FC 543 at para 29).

B. *Whether the RAD failed to consider the Applicant's employment dismissal letter?*

(1) Applicant's Position

[25] The RAD failed to turn its mind to the Applicant's employment dismissal letter, which supported her account that the PSB suspected her of participating in Falun Gong activities.

(2) Respondent's Position

[26] The dismissal letter was not credible evidence, as the RAD already found that the Applicant was not a genuine Falun Gong practitioner. The RAD was not required to refer to the document.

(3) Conclusion

[27] I find that the RAD erred in failing to engage with the dismissal letter.

[28] This Court has found that a decision-maker need not refer to every piece of evidence before it unless faced with contradictory evidence (*Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at para 31):

I accept that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) at para 1). I also agree that failure to mention a particular piece of evidence in a decision does not mean that it was ignored (*Newfoundland Nurses* at para 16). But, when an administrative tribunal is silent on evidence clearly pointing to an opposite conclusion and squarely contradicting its findings of fact, the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its decision (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez* at para 17). This is the case here. The IAD was faced with contradictory evidence and, in those circumstances, it had the obligation to provide an analysis and explain why it preferred one part of the evidence over the other. It did not.

[Emphasis added.]

[29] I agree that the dismissal letter supports the Applicant's allegation that she was fired by her employer due to her Falun Gong practice and because the PSB sought her out at her work. The letter also directly contradicts the RAD's credibility findings with regard to the Applicant being sought out by the PSB and her exit from China. The RAD does not mention the dismissal letter and provides no reason to dismiss it. This was an error.

C. *Whether the RAD erred in finding that the Applicant is not a genuine Falun Gong practitioner?*

(1) Applicant's Position

[30] The RAD's treatment of the Applicant's evidence in support of her profile as a Falun Gong practitioner was unreasonable. In turn, the RAD's ultimate finding that the Applicant was not a genuine practitioner cannot stand. The RAD unreasonably dismissed the support letter from Zhonghua Yang on the sole basis that she did not appear as a witness before the RPD. The mere fact that the author of the letter did not appear as a witness was not a reasonable basis to afford an otherwise highly probative document no weight. The RAD also conducted an unduly onerous assessment of the Applicant's knowledge of Falun Gong.

(2) Respondent's Position

[31] The RAD is entitled to assess a claimant's knowledge of the details of their alleged religion so long as it is cautious of the highly subjective and personal nature of their beliefs. The RAD demonstrated such caution and reasonably concluded that the Applicant's level of knowledge was not consistent with her alleged level and duration of practice. The RAD noted that the Applicant's appeal submissions failed to challenge the low weight afforded to the support letter from Zhonghua Yang.

[32] The Applicant's written submissions refer to her Falun Gong activities in Canada, however the RAD had decided that the Applicant had not provided sufficient evidence that her activities in Canada were or are likely to come to the attention of Chinese authorities.

(3) Conclusion

[33] I disagree with the Applicant that the RAD dismissed the support letter from Zhonghua Yang on the sole basis that the author was not a witness at the RPD hearing. The RAD noted that the RPD gave little weight to the letter because the evidence did not outweigh the Applicant's lack of knowledge of Falun Gong principles.

[34] However, I agree with the Applicant that the RAD's assessment of her knowledge of Falun Gong was unreasonable and microscopic. This Court has cautioned against testing a claimant's faith, and has found that a failure to answer questions about a certain detail in religious dogma means nothing of value (*Zhang v Canada (Citizenship and Immigration)*, 2012 FC 503 at paras 12-14). It is the "sincerity of belief that matters"; there is no need to "prove the validity of their beliefs are objectively recognized as valid" (*Huang v Canada (Citizenship and Immigration)*, 2012 FC 1002 at paras 9, 12). This Court has stated that "[t]he RPD's questioning of a claimant about their beliefs or practices will be defensible only if it goes to questions which focus on the sincerity of the beliefs or practices" (*Zhang v Canada (Citizenship and Immigration)*, 2018 FC 1237 at para 27).

[35] The RAD's assessment of the Applicant's practice unreasonably focused on her familiarity with certain texts and concepts. The RAD stated that because Falun Gong is a knowledge-based practice, there was an implicit requirement to be familiar with Master Li's text, Zhuan Falun. The RAD proceeded to assert that "a genuine practitioner would, at the very least, be familiar with it, and more reasonably, be familiar with its contents commensurate to their duration and level of Falun Gong practice." Such an assertion is exactly the type of flawed testing of belief that this Court has cautioned against.

[36] The RAD also conducted a microscopic analysis when it took issue with the Applicant's inability to articulate the concept of righteous thoughts to the RAD's accepted standard of accuracy. The RAD found that "the Applicant's explanation made no mention of purging evil and purging her own problems so as not to be taken advantage of by the evil." However, in response to being asked about righteous thoughts during the RPD hearing, the Applicant stated, "[b]ecause there is many bad substance inside our body, by giving out this righteous thought so we can clear those bad element inside the body." The Applicant's description of righteous thought clearly describes purging "bad elements".

[37] The RAD's determination about the genuineness of the Applicant's practice was inextricably linked to its assessment of her overall credibility and her allegations of events prior to fleeing China. It taints the entire decision.

VII. Conclusion

[38] The application for judicial review is granted. The RAD erred in disregarding the support letter and unreasonably assessed the genuineness of the Applicant's Falun Gong practice.

[39] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-6187-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted for redetermination by a different member of the RAD.
2. There is no question of general importance for certification.
3. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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