

Federal Court



Cour fédérale

Date: 20210528

Docket: IMM-1329-20

Citation: 2021 FC 510

Montréal, Quebec, May 28, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

XIA ZHANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

ORDER AND REASONS

[1] In the context of her underlying application for judicial review (the underlying application), the Applicant, Xia Zhang, has filed a motion in writing under Rule 369 of the *Federal Courts Rules*, SOR/ 98-106 dated May 7, 2021 by which she seeks, *inter alia*, an Order that the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the Tribunal) provide a transcript of the oral testimony given during the hearing of her appeal that gave rise to the Tribunal's decision dated 10 February 2020, being the subject of the underlying application.

[2] Ms. Zhang bases her argument on Rule 17 (d) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* , SOR/93-22 (the CIRPR) which states:

17 Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:

...

(d) a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,

and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

[Emphasis added]

17 Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :

...

d) la transcription, s'il y a lieu, de tout témoignage donné de vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire,

ont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

[Je souligne]

[3] In his Order granting leave to commence the underlying application (the Leave Order),

Mr. Justice Manson ordered, *inter alia*, that:

4. The Tribunal shall send a certified copy of its record electronically to the parties and to the Registry of the Court on or before April 20, 2021, pursuant to the following procedure:

the Registry of the Court shall provide the Tribunal and the parties with a link to a Cloud-based folder managed by the Registry of the Court;

- a. the Tribunal shall upload its record to the Cloud-based folder provided by the Registry of the Court;
- b. the Tribunal shall provide timely notice to the Registry of the Court and the parties once it has uploaded its record, within the earlier of 72 hours of the upload or April 20, 2021;
- c. for the purpose of the Tribunal meeting its obligation to file a copy of its record pursuant to this Order, the uploading of the record to the Cloud-based folder shall be deemed to constitute the filing of the record with the Court;
- d. if it is not feasible for the Tribunal to send copies of its record electronically within the time frame set out above, the Tribunal shall:
- e. send certified paper copies of its record to the parties and to the Registry of the Court within the time frame set out above accompanied by a statement confirming the Tribunal's inability to provide an electronic record; or
 - i. on consent of both parties, either send a copy of its record electronically or in paper format, accompanied by a statement confirming the Tribunal's inability to provide an electronic record, to each party and to the Registry of the Court by a later date agreed by the parties or submit an informal motion for extension of time and revision of the hearing date (as required), pursuant to the Court Notice entitled Informal Requests for Interlocutory Relief;
 - ii. if the Tribunal sends its record in paper format, any party that intends to scan the paper record is encouraged to exchange an electronic copy with the other party and the Registry of the Court as soon as possible.

[Emphasis added]

[4] Putting aside the issue raised by Ms. Zhang as to the possible late filing by the Tribunal, as ordered by the Court, the Tribunal uploaded its record to the Cloud-based folder managed by

the Registry, however rather than including a paper transcript of the oral testimony given during Ms. Zhang's appeal, it uploaded a copy of the audio recording of the proceedings as no transcript of the testimony was produced or needed by the Tribunal, and thus no transcript was before the Tribunal at the time of its decision.

[5] The Minister advised the Court by letter dated May 14, 2021 that he takes no position on the issue, however he also advised that the Tribunal, as an independent administrative tribunal, will provide its own response to Ms. Zhang's motion.

[6] On May 25, 2021, the Tribunal set out its position, followed by reply submissions by Ms. Zhang on May 27, 2021. In short, the Tribunal takes the position that it has complied with the Leave Order and its requirements under the law. It says it is under no statutory obligation to provide a transcript, and thus the uploading of the audio recording was sufficient in this case to comply with the Leave Order.

[7] Ms. Zhang disagrees with the Tribunal's interpretation of Rule 17(d) of the *CIRPR* and now seeks to compel the Tribunal to prepare and provide a written transcript of the testimony.

[8] I cannot agree with Ms. Zhang. Rule 17(d) of the *CIRPR* does not impose an obligation on the Tribunal to provide a transcript for the purposes of a judicial review application where one has not already been prepared for the purposes of its file. Rule 17(d) of the *CIRPR* clearly states that a transcript, if any, is to be included as part of the Tribunal's record.

[9] The issue has already been determined by this Court in *Sanchez Jimenez v. Canada (Citizenship and Immigration)*, 2009 FC 1098 [Jimenez] where Mr. Justice Pinard stated at paragraph 6:

- a. Relying mainly on *Likele v. Canada (M.C.I.)*, 1999 CanLII 8703 (FC), [1999] F.C.J No. 1693 (F.C.T.D.) (QL), the applicant contends, first, that there was a breach of natural justice due to the fact that a transcript of the hearing before the panel was not available. As a result, the applicant claims she cannot present all of her arguments regarding this application for judicial review. I do not agree. Paragraph 17(d) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, imposes no obligation on the panel to prepare a transcript...

[Emphasis added]

[10] Moreover, Ms. Zhang has not pointed to any statutory right that she would have to a recording of the oral testimony given during her appeal, and as such, the failure to provide a written transcript does not automatically constitute a breach of natural justice. In *Singh v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 363, Mr. Justice Martineau noted the following at paragraph 3 with respect to the absence of a transcript:

On the one hand, it has been repeatedly established that the failure to record proceedings, except when it is provided by law, does not give rise to recourse for violation of the rules of natural justice (*Canadian Union of Public Employees, Local 301 v. Montréal (City)*, 1997 CanLII 386 (SCC), [1997] 1 S.C.R. 793 at paragraphs 79-87 (S.C.C.)). On the other hand, the absence of a transcript, while it is not fatal, can hinder the Court sitting in review from verifying, *inter alia*, whether the panel's general finding of lack of credibility is supported by the evidence in the record and whether this finding is reasonable. In this case, there is no requirement in the Act pertaining to the recording of the remarks made at the hearing. The Court must therefore determine whether the record provided allows it to properly dispose of this application for review (*Ahmed v. Canada (Minister of*

Citizenship and Immigration), [2000] F.C.J. No. 739 (F.C.T.D.) (QL), (2000) 2000 CanLII 15388 (FC), 182 F.T.R. 312; and *Hatami v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 402 (F.C.T.D.) (QL)).

[Emphasis added]

[11] The issue therefore becomes whether, without a transcript, the Court is able to properly dispose of the underlying application, and if so, the absence of a transcript will not violate the rules of natural justice (*Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 [Canadian Union]).

[12] Ms. Zhang argues, in addition, that the failure on the part of the Tribunal to provide and upload a written transcript violated the Leave Order. I disagree. The Leave Order simply ordered the Tribunal to send a certified copy of its record electronically to the parties. A written transcript was not part of the Tribunal's record, and I can see no reason to impose the burden of preparing such a transcript on the Tribunal where such an imposition does not otherwise exist.

[13] Ms. Zhang's attempt at distinguishing *Jimenez* and *Canadian Union* with the present matter is not convincing. It may well be that, due to error or failure of equipment, no audio recording of the hearing took place in those cases. However, the reasoning of those decisions is nonetheless applicable to situations where an audio recording does exist. To accept Ms. Zhang's logic would mean to impose upon the Tribunal the obligation to prepare a written transcript of a hearing where an audio recording exists, notwithstanding that the law does not impose upon the Tribunal an obligation to even record the hearings; that cannot be right.

[14] With the audio recording in hand, Ms. Zhang is free to have the relevant portions of the testimony transcribed as part of her application record. If there is any issue, no doubt the Tribunal may then choose to see to relevant portions also being transcribed as part of its record. The Court will have the benefit of such transcripts in respect of the relevant issues at hand, and more importantly, the audio recording as a whole.

ORDER IN IMM-1329-20

THE COURT ORDERS that:

1. The Applicant's motion is dismissed.
2. No costs are awarded.

"Peter G. Pamel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1329-20

STYLE OF CAUSE: XIA ZHANG v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

**MOTIONS IN WRITING CONSIDERED AT MONTRÉAL, QUEBEC
PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: PAMEL J.

DATED: MAY 28, 2021

WRITTEN SUBMISSIONS BY:

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Robert Gibson FOR THE RESPONDENT

Jennifer Harnum FOR THE IMMIGRATION AND
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