Federal Court  Cour fédérale

Date: 20210916

Docket: IMM-3490-20

Citation: 2021 FC 956

Ottawa, Ontario, September 16, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

QIQING LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Qiqing Li, seeks judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada. Mr. Li is a citizen of China who fears religious persecution by the Public Security Bureau (PSB) as a member of an underground church known as the Shouters. A friend introduced Mr. Li to the church.

[2] Following a raid of the church by the PSB, Mr. Li went into hiding to evade the PSB who continued to search for him. Mr. Li fled to Canada with a smuggler's assistance and made a claim for refugee protection. He continued to practice his religion at a church in Toronto.

[3] The Refugee Protection Division (RPD) dismissed Mr. Li's claim, finding that he lacked credibility and that he failed to establish a *sur place* claim that his religious activities in Canada would put him at risk upon return to China. The RAD dismissed Mr. Li's appeal of the RPD decision and confirmed the RPD's determination that Mr. Li is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[4] On this application for judicial review, Mr. Li submits the RAD erred by refusing to admit a document regarding the friend's arrest as new evidence on appeal. In addition, Mr. Li submits the RAD conducted an unreasonable assessment of his *sur place* claim, which was based on an unreasonable credibility finding.

[5] For the reasons below, Mr. Li has not established that the RAD's decision is unreasonable. This application for judicial review is dismissed.

II. **Issues and Standard of Review**

[6] The issues on this application are whether the RAD's decision is unreasonable based on three alleged errors:

(1) Did the RAD err by refusing to admit new evidence?

(2) Did the RAD err in its credibility findings?

(3) Did the RAD err in assessing the *sur place* claim?

[7] The applicable standard of review is reasonableness, conducted according to the revised framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In applying the reasonableness standard, the Court must ask whether the decision under review bears the hallmarks of reasonableness—justification, transparency, and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at para 99.

III. **Analysis**

A. *Did the RAD err by refusing to admit new evidence?*

[8] The RAD refused to admit a Notice of Arrest, issued against Mr. Li's friend, as new evidence on appeal. The RAD held that the document does not meet the conditions for admissibility that are set out in section 110(4) of the *IRPA* because the document pre-dates the RPD hearing, it was reasonably available, and Mr. Li's explanation as to why he could not have presented it prior to the RPD's rejection of his claim was not persuasive. Specifically, the RAD found that the document confirms an arrest that was known to Mr. Li one year before the RPD hearing in July 2018. Mr. Li's explanation that he did not know he could obtain the document was not persuasive for various reasons: (i) Mr. Li was represented by experienced counsel; (ii) the basis of claim (BOC) form that he completed instructs applicants to attach copies of any

documents in support of their claim or supply them without delay; and (iii) Rule 11 of the *Refugee Protection Division Rules,* SOR/2012-256, requires applicants to "provide acceptable documents establishing their identity and other elements of the claim."

[9] Mr. Li argues that the RAD unreasonably refused to admit a document that corroborates a central allegation of his claim, i.e. that the friend was arrested. According to Mr. Li, it was unreasonable for the RAD to find, in effect, that he should have known that a Notice of Arrest had been issued and he should have obtained a copy prior to the RPD hearing because he was aware of the friend's arrest and he was represented by counsel. He states that the mere fact he was aware of his friend's arrest does not mean he should have known that the PSB had issued a formal document in respect of the arrest, and the RAD's assumption on this point does not rest on any evidence. Furthermore, he states that when an applicant does not know that a document exists, whether he has counsel is irrelevant. Mr. Li argues that, at the very least, the RAD should have admitted the document and held an oral hearing pursuant to section 110(6) of the *IRPA* in order to put its concerns to him.

[10] The respondent submits the RAD's decision to exclude the new evidence was reasonable. The respondent relies on *Gu v Canada (Minister of Citizenship and Immigration)*, 2017 FC 543 [*Gu*] at paragraph 42, where the Court held that it was open to the RAD to refuse to admit documents related to an arrest that had occurred a month before the RPD rejected the applicants' claim, on the basis that the applicants had failed to explain why the documents were not reasonably available. The Court held that, even if the applicants were unable to obtain the documents before the decision was rendered a month later, it was open for the RAD to conclude

that they could have notified the RPD about the existence of the new evidence. Mr. Li counters that *Gu* is distinguishable, on the basis that the applicants in that case knew the documents existed prior to the RPD's decision.

[11] In my view, Mr. Li has not established that the RAD's refusal to admit the new evidence is unreasonable.

[12] Section 110(4) of the *IRPA* reads as follows:

Evidence that may be presented	**Éléments de preuve admissibles**
110 (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	110 (4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[13] In *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*], the Federal Court of Appeal explained that the legislative framework for an appeal to the RAD reflects Parliament's clear intention to narrowly define the conditions for introducing new evidence: *Singh* at paras 35 and 51. The section 110(4) conditions are inescapable and leave no room for discretion on the part of the RAD, although the RAD has the freedom to apply them with more or less flexibility, depending on the circumstances: *Singh* at paras 35 and 64.

[14] As noted above, the Notice of Arrest pre-dates the RPD's rejection of Mr. Li's claim, and confirms an arrest that was known to him one year before the RPD hearing. As the respondent correctly notes, Mr. Li was required to establish that he could not have been expected to provide the document at the RPD hearing: *Singh* at para 35. Mr. Li stated in his affidavit before the RAD:

> 3. After the first hearing it came to my attention that I could get the Notice of Arrest. Prior to such time, I did not know I could get this document. My family went to the family of the arrested member in China and asked whether he was in possession of such document. At that time, the new document came into my possession via facsimile.
>
> 4. On or about August 10, 2018 my wife advised me that she met [the friend]'s wife who told my wife that she was in possession of a Notice of arrest for her husband…Therefore my wife was given a copy of the document.

[15] I agree with the respondent that the RAD reasonably expected Mr. Li or his counsel to take steps to obtain relevant evidence prior to the RPD hearing, noting the instructions in the BOC form itself. Mr. Li's affidavit does not describe efforts to inquire about or attempt to obtain documentary evidence about the arrest prior to the RPD's decision. The RAD reasonably concluded that Mr. Li's explanation that he did not know he could get this document was not persuasive.

[16] I disagree with Mr. Li that *Gu* is distinguishable on the basis that the applicants in that case knew the documents in question existed before the RPD rendered its decision. The Court's findings in *Gu* did not turn on when the applicants learned about the existence of the documents: *Gu* at paras 43-44. That said, the relevance of Court's findings in *Gu* is limited because the

reasonableness of the RAD's refusal to admit the Notice of Arrest depends on the RAD's reasons in this case and the facts in this case.

[17] In my view, the RAD's findings that the Notice of Arrest was reasonably available and that Mr. Li's explanation of why it could not have been presented at the time of rejection was unpersuasive accord with the principles set out in *Singh*. It is not the RAD's role to provide an opportunity to complete a deficient record before the RPD: *Singh* at para 54. The RAD reasonably found that the Notice of Arrest does not meet the statutory conditions to be admitted as new evidence on appeal.

B. *Did the RAD err in its credibility findings?*

[18] The RAD's global credibility assessment rests on three negative credibility findings: (i) Mr. Li gave contradictory evidence about the location of the church services in China and the PSB raid; (ii) Mr. Li did not mention in his BOC narrative that two days after the raid, he moved from a first hiding place in Fujian province to a second hiding place in Zhejiang province, where he remained until he left China more than a month later; and (iii) Mr. Li gave contradictory evidence about the smuggler who helped him to leave China.

[19] While Mr. Li's memorandum of argument on this application challenged the RAD's first and second credibility findings summarized above, at the hearing before this Court Mr. Li restricted his challenge to the second finding, which is about his failure to mention both hiding places in the BOC narrative. Mr. Li submits that the RAD's unreasonable finding in this regard is significant and renders the global credibility assessment unreasonable.

[20] Mr. Li submits that the RAD unreasonably relied on "form over substance" and ignored the totality of the evidence when it found that a failure to mention both hiding places in the BOC narrative undermined Mr. Li's allegations about the incidents that occurred in China. Mr. Li contends the BOC form is only one of a series of forms that a refugee claimant submits when he or she makes a claim for protection, and his own amended Schedule A form did disclose that he had been in Zhejiang province when he left China.

[21] Mr. Li argues that it was unreasonable for the RAD to find that the omission of the second hiding place from the BOC form specifically was significant. In this regard, the RAD distinguished the purpose of the various forms. Certain forms, including the Schedule A form, were said to be "within the purview of Immigration, Refugees and Citizenship Canada (IRCC) / Citizenship and Immigration Canada", with the purpose being to collect background information and not to ask about the claim itself. The RAD further stated that a refugee claimant's story is to be provided to the RPD directly in the BOC form, which is sworn to be "complete, true, and correct".

[22] Mr. Li submits that it was unreasonable for the RAD to expect that he would appreciate the purported distinctions between various refugee claim forms, and to expect that he should repeat information found in the amended Schedule A form in his BOC narrative. Mr. Li submits that this discrepancy between the information included in the BOC narrative and the information in the amended Schedule A form was not a reasonable basis for the RAD's negative credibility finding. He argues that his case is similar to *Samseen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 542 at paragraphs 4-5 and 32, where the Court found that "the Board was

overzealous in its search for inconsistencies in finding the applicant's omission in question 9 of his PIF [Personal Information Form] that he was detained by the army to be of significance, since he had included this information in his PIF narrative."

[23] Furthermore, Mr. Li argues the RAD failed to consider how his profile might have affected the evidence. When considered in light of a 6th grade level of education, clinical symptoms of PTSD and depression, and his reported psychological symptoms (including poor memory, concentration, and focus), there was no omission on his part. Mr. Li states that his forms, when considered together, reveal the timeline of his move from one hiding place to the other.

[24] The respondent argues the RAD reasonably found that the failure to include the second hiding place in the BOC narrative was a significant omission that undermined Mr. Li's account of evading the PSB. Given that Mr. Li allegedly hid in Zhejiang province for over a month to escape persecution, the respondent contends the RAD reasonably found it unlikely that this information would be overlooked in the BOC narrative. Material omissions from a BOC narrative going to central elements of a claim may ground adverse credibility findings: *Osinowo v Canada (Minister of Citizenship and Immigration)*, 2018 FC 284 at paras 15-17.

[25] The respondent submits that the inconsistencies and omissions in Mr. Li's evidence are related to central issues, not peripheral ones, and relies on *Kaur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1379 [*Kaur*] at para 34:

> [34] If the Court can ascertain any reasonable basis in the evidence for the Board's adverse credibility findings, or if those

> findings can be said to be rationally supported, for example, on the basis of confirmed and important inconsistencies, contradictions or omissions [ICOs] in the evidence, those findings should ordinarily withstand the Court's review (*Dunsmuir*, above at para 41). This is true even if the evidence in question is not specifically mentioned, or is only partially addressed, in the Board's decision. [Emphasis in original.]

[26] The respondent submits that the RAD addressed the psychological report from Dr. Pilowsky and did not find it persuasive. The respondent relies on decisions of this Court that indicate a psychological report cannot replace an applicant's evidence or cure deficiencies in an applicant's evidence: *Yuan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1073 at para 22, citing *Khatun v Canada (Minister of Citizenship and Immigration)*, 2012 FC 159 at para 94. The respondent also relies on this Court's decisions that have noted shortcomings of Dr. Pilowsky's reports in particular: *Okoloise v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1008 at para 7; *A.C. v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1196 at para 48, citing *Hernadi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 CanLII 126350 (FC).

[27] In my view, the RAD did not err in its credibility findings.

[28] On appeal to the RAD, Mr. Li had argued that the RPD erred by drawing a negative inference from the fact that his BOC form did not mention the second hiding place. The RAD squarely addressed the alleged error. The RAD was aware of the information in the amended Schedule A form, indicating that Mr. Li resided in Zhejiang province from July 2017 to August 2017. Nonetheless, the RAD found that the failure to mention both hiding places in the BOC narrative was a significant omission, and when Mr. Li was asked why the second hiding place

was omitted from the BOC narrative, he had not provided a reasonable explanation. The RAD explained that being pursued by and evading the PSB after his church was raided was a key aspect of Mr. Li's refugee claim. Also, the RAD noted Mr. Li's testimony that he stayed at the first location for only two days before moving very far away to a different province, which was a significant step that he took in order to escape persecution and avoid risk to others. In light of credibility issues about the location of the church services, the RAD found that the failure to mention the place where Mr. Li spent the majority of his time in hiding illustrates that his account is not credible. These findings are rationally supported by the evidence (*Kaur* at paragraph 34) and it was open to the RAD to find that, had Mr. Li lived in hiding in two different locations after escaping the PSB raid, this should have been included in the BOC narrative.

[29] While I accept that Mr. Li may not appreciate distinctions in the purpose of various claim forms, I do not agree that the RAD failed to consider all of the evidence or that the RAD's statements about the purpose of the various forms renders the decision unreasonable. The RAD was clearly aware of and considered the information in Mr. Li's amended Schedule A form. The RAD's discussion about the purpose of the various forms was responsive to Mr. Li's arguments on appeal that any concern about his failure to include both hiding places in the BOC narrative was unduly microscopic, purely technical and not substantive. The RAD's point was that Mr. Li's failure to explain the move to Zhejiang province or to mention the place where he spent the vast majority of his time in hiding in the BOC—a document which provides refugee claimants with the opportunity to describe in their own words what occurred and why they are requesting protection—was a significant omission. This was a reasonable finding, in my view. The amended Schedule A form lists an address in Fujian province where Mr. Li was living "2017-07/2017-07" and an address in Zhejiang province where he was living "2017-07/2017/08", but

lacks details about the significance of the addresses or the events that prompted Mr. Li to change locations. In my view, the inclusion of two addresses in the amended Schedule A form did not fill in a gap in the BOC narrative regarding an event that the RAD reasonably considered to be significant.

[30] Thus, the RAD reasonably considered the omission and found that Mr. Li's explanations were not persuasive. Mr. Li has not established that the RAD's credibility finding or global credibility assessment are unreasonable.

C. *Did the RAD err in its assessment of the* sur place *claim?*

[31] Notwithstanding the RAD's credibility assessment, Mr. Li argues that the RAD's errors in assessing the *sur place* claim warrant setting the decision aside. The purpose of engaging in a *sur place* assessment was to determine whether Mr. Li faces a risk upon return based on his religious activities in Canada, despite any adverse findings about the incidents in China. He submits the analysis of the *sur place* claim was unfairly corrupted by the RAD's credibility findings that were then applied to the evidence of his religious practice in Canada: *Liu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 972 [*Liu*] at para 8. Mr. Li states that his case is similar to *Chen v Canada (Minister of Citizenship and Immigration)*, 2014 FC 749 [*Chen*] at paragraphs 58-59, where the Court found that there was no real assessment of whether the applicant had become a genuine Falun Gong practitioner in Canada, and that "[t]he bald assertion that she isn't genuine because she wasn't a genuine practitioner in China does not make logical sense and simply ignores the guiding jurisprudence of this Court on point."

[32] Mr. Li asserts that his claim "had already been lost" by the time the RAD turned its mind to his *sur place* allegations, and argues that such an approach cannot withstand scrutiny. According to Mr. Li, the record reveals that he testified with credible detail on his religious knowledge and that he provided probative, corroborative evidence regarding his Christian practice in Canada. A pastor's letter speaking to Mr. Li's church attendance, eligibility for baptism, and religious activities was unreasonably discounted on the basis that it was insufficient to overcome the adverse credibility findings, and could have been obtained to advance a fraudulent refugee claim. Mr. Li submits that the RAD's flawed logic created a charade that made it impossible to establish genuine faith: if he had not been able to answer questions about his faith, the RAD would have drawn a negative inference; however, since he was able to demonstrate religious knowledge, the knowledge was given no weight. This approach is tantamount to the RAD stating, "I do not believe you, therefore I do not believe anything that explains why I might be wrong": *Sterling v Canada (Minister of Citizenship and Immigration)*, 2016 FC 329 at para 12. Mr. Li also relies on *Huang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1002 at paragraph 15 for the proposition that the suggestion of fraudulent intent supports an inference that the RAD held him to a higher standard of religious knowledge than is necessary to ground sincerity of belief.

[33] Also, Mr. Li submits the RAD erred in finding that he is not at risk of religious persecution in China because he has not been "observed, photographed, or approached or faced harassment from anyone while engaged in church activities" in Canada. He argues that the RAD assumed the only repercussion that could amount to persecution is detection by the Chinese authorities, failing to appreciate that religious freedom includes the right to worship freely and

openly. Any meaningful restriction on Mr. Li's ability to practice his religion, which has been designated as an "evil cult" by the Chinese government, would give rise to religious persecution: *Fosu v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1813, 27 Imm LR (2d) 95 at para 5; *Liang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 65 at para 2; *Weng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1483.

[34] I am not persuaded that the RAD's approach to the *sur place* claim was unreasonable. After considering the evidence, the RAD reasonably concluded that: (i) despite evidence of church attendance in Canada and some faith-based knowledge, Mr. Li failed to establish that he is a genuine practitioner in Canada; and (ii) there was no persuasive evidence to suggest that Mr. Li's participation in Christian activities has come to the attention of Chinese authorities or that he would be perceived as a genuine Christian upon return to China.

[35] With respect to whether Mr. Li is a genuine practitioner in Canada, I agree with the respondent that the RAD did not err by taking into account the negative credibility findings regarding events in China as part of its assessment of the sincerity of Mr. Li's professed beliefs in relation to the *sur place* claim: *Gu* at para 40; *Li v Canada (Minister of Citizenship and Immigration)*, 2018 FC 877 at para 29; *Tan v Canada (Minister of Citizenship and Immigration)*, 2019 FC 502 [*Tan*] at para 48. In *Sheikh v Canada (Minister of Employment & Immigration)*, [1990] 3 FC 238, 71 DLR (4th) 604 (FCA), the Federal Court of Appeal determined that "a general finding of a lack of credibility on the part of an applicant may conceivably extend to all relevant evidence emanating from his testimony".

[36] In *Chen*, the Court found there was "strong evidence here of a detailed and genuine knowledge of Falun Gong and long and persistent practice in Canada" and "no attempt by the Board to discover and consider whether the Applicant is now a genuine practitioner. The Board's analysis simply stops with the assertion that if the Applicant was not a genuine practitioner in China then she cannot be a genuine practitioner in Canada." Unlike the decision under review in *Chen*, the RAD in this case did not rely on a bald assertion that Mr. Li is not a genuine practitioner in Canada because he was not a genuine practitioner in China and it did not fail to conduct a "real assessment" of whether Mr. Li has become a genuine practitioner since arriving in Canada. The RAD considered whether the evidence established that Mr. Li is sincere in his church practice in Canada, and reasonably concluded Mr. Li had not met his onus to establish a *sur place* claim. The RAD noted that Mr. Li's practice of Christianity in Canada stems from the events that began in China. He presented himself as someone who learned about the Shouters in China from a friend and that he attended a house church that was raided—all of which the RAD found to be untrue. The RAD found that Mr. Li "ha[d] not shown his sincerity at any point along this process, and the credibility concerns are such that, despite showing some faith-based knowledge, the sincerity of his current beliefs has not been sufficiently established on a balance of probabilities." The RAD agreed with the RPD that the pastor's letter did not overcome the lack of credibility. Based on the record, it was reasonable for the RAD to find the pastor's letter was insufficient to establish that Mr. Li is a genuine adherent to the religion: *Tan* at para 47.

[37] Furthermore, the RAD did not commit the same error identified in *Liu* at paragraph 8, of failing to consider whether, despite not being a genuine adherent, Mr. Li would be identified as a

practitioner and face persecution in China for that reason. The RAD found, on a balance of probabilities, that Mr. Li would not practice Christianity with the Shouters church on return to China. The RAD also considered whether Mr. Li's participation in Christian activities has come to the attention of Chinese authorities, or whether he would be perceived as a genuine Christian upon return to China. The RAD concluded, reasonably in my view, that Mr. Li's activities in Canada would not place him at risk upon return to China.

[38] In summary, Mr. Li has failed to establish that the RAD's assessment of his *sur place* claim is unreasonable.

IV. **Conclusion**

[39] Mr. Li has not established that the RAD's decision is unreasonable, and this application for judicial review is dismissed.

[40] Neither party proposes a question for certification. There is no question to certify in this case.

JUDGMENT in IMM-3490-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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